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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Petitioner,

v.

L. LEE BEARDSLY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the timeliness of a suit for an order compelling arbitration of a labor dispute is governed by the six-month limitations period established in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), as a suitable accommodation between the interests of employees seeking relief under the labor laws and the important federal interest in the stability of settled labor-management relations.

2. If the court below correctly held that the timeliness of labor arbitration is governed by laches rather than the six-month *DelCostello* limitations rule, whether the court or the arbitrator has jurisdiction to decide the laches issue; and, if the issue is for the arbitrator to decide, as was held below, whether courts nonetheless have jurisdiction to dictate considerations to be taken into account by arbitrators in deciding the issue.

LIST OF PARTIES

Petitioner Chicago and North Western Transportation Company is the wholly-owned subsidiary of the Chicago and North Western Corporation. Its subsidiaries and affiliates within the meaning of Rule 28.1 are Iowa Transfer Company, Kansas City Terminal Company, MT Properties, Inc., Peoria and Pekin Union Railway Company, Trailer Train Company, Transportation Data Exchange, Inc., ACE Limited, Railroad Association Insurance, Ltd., Transportation and Railroad Assurance Company, Ltd., TQ Group, and West Parcel Venture.

The parties to the proceeding below, in addition to those listed in the caption, are as follows:

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Defendants/appellees

Brotherhood of Locomotive Engineers
Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
Railroad Yardmasters of America
United Transportation Union

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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
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v.

L. LEE BEARDSLY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Chicago and North Western Transportation Company ("C&NW") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 5a) is reported at 850 F.2d 1255 (8th Cir. 1988). Its order denying rehearing (App. 79a) is unreported. The district court's opinions (App. 45a, 52a, 65a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. 74a) was entered on June 15, 1988.[1] A timely petition for rehearing was denied on September 14, 1988. (App. 79a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3 First of the Railway Labor Act, 45 U.S.C. § 153 First; § 105 of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1004; § 704(g) of the Regional Rail Reorganization Act, as amended, 45 U.S.C. § 797c(g); and § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), are reproduced in pertinent part at App. 80a-84a.

STATEMENT

This case arises from actions by former employees of a bankrupt railroad against their unions and petitioner C&NW, challenging the hiring and seniority arrangements implemented when C&NW took over the operation of the bankrupt railroad's lines. These employees waited to come to court for many months, and in many cases, several years, after the seniority and hiring arrangements were in place. The courts below recognized that, insofar as these employees couched their challenges in terms of unfair representation by the unions, their claims

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[1] The court of appeals originally entered an opinion and judgment in this case on January 21, 1988. C&NW and the other appellees filed timely petitions for panel and *en banc* rehearing. On June 15, 1988, the panel vacated its January 21 opinion and judgment and replaced them with the opinion reported at 850 F.2d 1255 and a revised judgment in favor of respondents. (App. 1a, 74a). On June 20, 1988, the court denied the initial petitions for rehearing *en banc* from the original, vacated, opinion. (App. 78a). C&NW then filed a timely petition for rehearing of the second, substituted, opinion and judgment, which was denied on September 14, 1988. (App. 79a). The revised second decision is the subject of this petition for certiorari.

were barred by the six-month limitations period that this Court established in *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983). The court of appeals, however, held that it still had the power to compel arbitration of the seniority and hiring disputes, subject only to the defense of laches, which it referred to the arbitrators to decide, but with detailed instructions by the court as to factors the arbitrators must consider in making that decision. The principal question presented is whether the timeliness of a suit to compel arbitration of a labor dispute is governed by the *DelCostello* limitations period.[2]

1. *History of the Dispute.* In March 1980, C&NW commenced operations on certain lines of the bankrupt Chicago, Rock Island and Pacific Railroad ("Rock Island").[3] On March 4, 1980, C&NW, along with other railroads who were operating or expected to operate on Rock Island lines, entered into an agreement with all the major railroad unions. (App. 9a-11a). This "March 4 Agreement" provided that the acquiring railroads would give former Rock Island employees the right of first hire to any "additional" jobs that the railroads established as a result of the operation of Rock Island lines. The agreement also required the railroads and unions to allocate seniority, either by agreement or by interest arbitration, among the railroads' incumbent employees and any former Rock Island employees hired for the additional jobs. The March 4 Agreement expressly provided that it would "constitute the complete labor protection obligation" of

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[2] A secondary question, that would be reached only if laches, rather than limitations under *DelCostello*, is held to govern, is whether the court or the arbitrator should determine the issue of laches, *i.e.*, whether laches is a matter of "procedural arbitrability" that is itself committed to arbitration under this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964).

[3] C&NW initially operated these lines under an Interstate Commerce Commission order to provide for interim operations on the Rock Island pending final disposition of the Rock Island estate, and ultimately purchased the lines.

the railroads to the employees hired for such additional jobs.[4]

The March 4 Agreement also provided that the railroads would have "no labor protection obligation" to any other Rock Island employees.[5] A further obligation to such employees was imposed, however, by the Rock Island Railroad Transition and Employee Assistance Act ("RITEA") in May 1980. 45 U.S.C. § 1001-1018. Section 105 of RITEA required the railroads to give all qualified former Rock Island employees a right of first hire to vacant positions, not just additional jobs resulting from operation of the Rock Island lines. 45 U.S.C. § 1004. RITEA made no provision concerning these employees' seniority.

When C&NW commenced operations over Rock Island lines in 1980, it hired the most senior qualified Rock Island applicants for additional jobs under the March 4 Agreement. C&NW also hired other Rock Island employees in accordance with § 105 of RITEA for positions not related to the new operations on Rock Island lines. All hiring of former Rock Island employees, both for additional jobs under the March 4 Agreement and for other jobs under RITEA, was completed by early 1981.

Following commencement of operations over the Rock Island lines, C&NW began negotiations with the unions on the question of how seniority should be allocated between incumbent C&NW employees and former Rock Island employees hired for "additional" jobs under the March 4 Agreement. Between 1980 and 1982, implementing agreements were reached with unions representing all employees whose claims are at issue on this petition.[6] Most of these agreements gave the Rock Island

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[4] Joint Appendix before the Eighth Circuit ("J.A.") at 382, 383.

[5] J.A. at 383.

[6] These employees are represented by the Brotherhood of Locomotive Engineers, the United Transportation Union, the Railway

employees preferential seniority rights to the additional jobs resulting from C&NW's operation of Rock Island lines, but made them junior to incumbent C&NW employees in jobs not attributable to the new operations; other agreements provided for Rock Island employees senior enough to be hired for additional jobs to be "dovetailed" onto C&NW seniority rosters.[7] All such seniority agreements for employees hired under the March 4 Agreement were completed by early 1982.

C&NW's hiring practices and the seniority agreements went unchallenged for nearly two years thereafter. Beginning in November 1983 and continuing through April 1984, however, the respondent former Rock Island employees brought suits in the Southern District of Iowa against C&NW and their unions.[8] Twenty-four of these

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Yardmasters' Association, and the Brotherhood of Railway, Airline & Steamship Clerks, and except in the case of the Yardmasters the implementing agreements were signed by the local Rock Island representatives of those unions. (J.A. at 1408, 1424, 1364-65). No final implementing agreement was reached with the Rock Island locals of the United Transportation Union with respect to the Rock Island ground service employees whom C&NW hired for "additional" jobs under the March 4 Agreement, and the seniority for these employees was determined through the interest arbitration procedure under the March 4 Agreement. Nine of these employees challenged the results of that arbitration in one of the consolidated actions below, *Newton* v. *Chicago & N.W. Transp. Co.*, No. 83-641-D (S.D. Iowa). A very large part of the court of appeals' opinion below relates to the ground service arbitration (App. 25a-37a), but C&NW does not contend that the *Newton* ground service employees' lawsuit was untimely and does not seek certiorari to review the judgment in their favor.

[7] "Dovetailing" is a mode of allocating seniority rights among employees in sales and mergers of businesses, under which employees of the merged or sold entity retain the same seniority dates in the surviving business. Under this method, junior employees of the surviving business become subordinated on the seniority roster to senior employees of the merged or sold business. *Humphrey* v. *Moore*, 375 U.S. 335, 339 (1964).

[8] *Reece, et al.* v. *C&NW, et al.*, No. 83-640-B (filed Nov. 18, 1983); *Newton, supra* (same); *Chambers, et al.* v. *C&NW, et al.*, No. 84-

employees had been hired for additional jobs under the March 4 Agreement; these employees contended that they were entitled not only to preferential seniority rights to those additional jobs, but also to be dovetailed onto C&NW's seniority rosters so that they would have rights to other C&NW jobs superior to the rights of many incumbent C&NW employees, even though the agreements these employees' unions had negotiated did not provide for dovetailing. Forty-four of these employees had been hired under RITEA for new jobs not related to C&NW's operation of Rock Island lines, but contended that they were entitled to be hired under the March 4 Agreement, and thus to receive dovetailed seniority. Eighty-one of these employees, who had not been hired by C&NW, claimed violations of first-hire rights under both § 105 of RITEA and the March 4 Agreement, and also claimed a right to dovetailed seniority under the Agreement. (App. 25a-26a). All of the employees contended that the alleged violations of first-hire and seniority rights resulted from unfair representation by their unions.

2. *The Decisions Below.* After consolidating the various cases, the district court dismissed all of the employees' claims. It held that the unfair representation claims were time-barred under the six-month *DelCostello* limitations period. (App. 47a-48a, 61a). The district court also held that it lacked jurisdiction over the claims under the March 4 Agreement and RITEA because disputes over the "interpretation or application" of railway labor agreements, such as the March 4 Agreement, fall within the exclusive jurisdiction of arbitration boards ("adjustment boards") under § 3 First(i) of the Railway Labor Act, 45 U.S.C. § 153 First(i), the jurisdiction of which

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641-D (filed Feb. 2, 1984); *Swift, et al.* v. *C&NW, et al.*, No. 84-80-B (same); *King, et al.* v. *C&NW, et al.*, No. 84-81-B (same); *Boll, et al.* v. *C&NW, et al.*, No. 84-82-B (same). Plaintiffs were added to *Reece* and *Newton* by amended complaints filed April 25, 1984.

extends also to claims under § 105 of RITEA.[9] (App. 47a, 68a, 71a).

The court of appeals for the Eighth Circuit affirmed the district court's holding that the unfair representation claims were barred under the *DelCostello* limitations period and that the other claims "cannot properly be brought in federal court." (App. 25a). It then turned *sua sponte* to the question of "what remedies, if any," could be granted the employees, and remanded the case to the district court with directions to enter orders compelling § 3 arbitration of the employees' claims under the March 4 Agreement and RITEA. (App. 25a, 41a-42a, 43a, 44a). The court also held, contrary to decisions of other courts of appeals that the availability of arbitration is subject to the *DelCostello* limitations period,[10] that the employees' claims were subject only to laches, a defense that the court said it would leave to the arbitrators to decide. (App. 42a). The court went on, however, to issue detailed instructions to the arbitrators as to how they must decide the laches question, directing them to "take into account" the possibility that the employees' delay in seeking relief was attributable to unfair representation by their unions. (*Id.*).

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[9] See 45 U.S.C. § 797c(g).

[10] See *Associated Brick Mason Contractors* v. *Harrington*, 820 F.2d 31 (2d Cir. 1987); *McCreedy* v. *Local Union No. 971, UAW*, 809 F.2d 1232 (6th Cir. 1987); and *International Ass'n of Machinists* v. *Allied Prods. Corp.*, 786 F.2d 1561 (11th Cir. 1986). The court below gave no reason for rejecting the *DelCostello* rule, but the argument that it applied to bar an order compelling arbitration had been presented to the panel. See Supplemental Brief for Defendants-Appellees Brotherhood of Locomotive Engineers and Railroad Yardmasters of America before the Eighth Circuit, at 4.

REASONS FOR GRANTING THE WRIT

I. The Decision Below That Laches Governs The Timeliness Of A Suit To Compel Arbitration Is In Conflict With Decisions In Six Other Circuits And With The Policies Underlying The *DelCostello* Rule

In *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), this Court held that a "hybrid" unfair representation action against a union and an employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is subject to a six-month limitations period. Following the rule that where no statute of limitations is provided for a federal statutory cause of action the courts should borrow the most suitable limitations rule from another source (*id.* at 162), the Court looked to § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), which provides a six-month limitations period for unfair labor practice claims under that Act. *Id.* at 169. This Court chose that limitations period for two reasons: (1) because of the need for uniform national limitations rules under the federal labor laws;[11] and (2) because § 10(b) was "actually designed to accommodate a balance of interests very similar to that" presented by a hybrid unfair representation claim—the balance of an employee's interest in setting aside " 'what he views as an unjust settlement' " against the " 'national interest[]' " in fostering stable labor relations through the "relatively rapid final resolution of labor disputes favored by federal law" and " 'finality of private [labor] settlements.' " 462 U.S. at 168, 169, 171.[12]

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[11] 462 U.S. at 171-72; see *Burnett* v. *Grattan*, 468 U.S. 42, 52 n.14 (1984) (explaining that *DelCostello* was based on the "importance of uniformity in the labor law field").

[12] Quoting *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 76 (1981) (Stewart, J., concurring). Although *DelCostello* was decided under the Labor Management Relations Act, every court of appeals that has considered the question, including the court below (App. 25a), has held that the *DelCostello* limitations period applies

The Eighth Circuit's refusal to apply the *DelCostello* limitations period to orders compelling labor arbitration is in conflict with the decisions of six other circuits. It is also irreconcilable with this Court's recognition in *DelCostello* and other decisions that uniform federal limitations periods ensuring prompt resolution of labor disputes are vitally important to stable labor relations. And the question presented is important, not only because it arises frequently, but because the lack of a uniform, definite limitations rule in cases where labor arbitration is sought would be enormously disruptive to labor relations.

A. Since *DelCostello*, the courts of appeals have recognized that the same "balance of interests" that led this Court to adopt a six-month limitations period for "hybrid" unfair representation claims is at stake in other sorts of labor disputes, and have applied the six-month limitations period to "a variety of statutory, non-hybrid labor claims for which Congress did not specify a limitations period," under both the National Labor Relations Act and the Railway Labor Act.[13] That reasoning has

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to "hybrid" actions under the Railway Labor Act as well. See *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239, 240 (2d Cir. 1984); *Sisco* v. *Consolidated Rail Corp.*, 732 F.2d 1188, 1192-93 (3d Cir. 1984); *Triplett* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 801 F.2d 700, 702 (4th Cir. 1986); *Brock* v. *Republic Airlines*, 776 F.2d 523, 525-26 (5th Cir. 1985); *Ranieri* v. *United Transp. Union*, 743 F.2d 598, 600-01 (7th Cir. 1984); *Barina* v. *Gulf Trading & Transp. Co.*, 726 F.2d 560, 563 n.6 (9th Cir. 1984); *Barnett* v. *United Airlines*, 738 F.2d 358, 363-64 (10th Cir. 1984); *Smallakoff* v. *Air Line Pilots Ass'n*, 825 F.2d 1544, 1545-46 (11th Cir. 1987).

[13] *Robinson* v. *Pan American World Airways*, 777 F.2d 84, 88 (2d Cir. 1985) (applying *DelCostello* to claim that carrier discharged plaintiff for union activities, in violation of §§ 2 Third and Fourth of the Railway Labor Act). See also *Brotherhood of Loc. Engineers* v. *Atchison, T. & S.F. Ry.*, 768 F.2d 914, 919 (7th Cir. 1985) (applying *DelCostello* to claim that railroad breached Railway Labor Act bargaining duties); *Coyle* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 838 F.2d 1404, 1406 (5th Cir. 1988) (applying *DelCostello* to claim that carrier discharged employee in violation of § 2

led six courts of appeals to hold that the *DelCostello* rule applies to actions to compel arbitration of labor disputes: "Arbitration is a policy at the heart of federal labor law * * *," and "to delay its occurrence" by applying lax timeliness rules "would defeat its purpose—the speedy resolution of labor disputes." *McCreedy* v. *Local Union No. 971, UAW*, 809 F.2d 1232, 1237 (6th Cir. 1987). Accord, *Communications Workers of America* v. *Western Electric Co.*, No. 88-1437 (1st Cir. Nov. 10, 1988); *Associated Brick Mason Contractors* v. *Harrington*, 820 F.2d 31, 36-37 (2d Cir. 1987); *International Ass'n of Machinists* v. *Allied Prods. Corp.*, 786 F.2d 1561, 1564 (11th Cir. 1986); *Teamsters Union* v. *Great Western Chemical Co.*, 781 F.2d 764, 766, 769 (9th Cir. 1986); *Federation of Westinghouse Independent Salaried Unions* v. *Westinghouse Electric Corp.*, 736 F.2d 896, 901-02 (3d Cir. 1984).[14] The Eighth Circuit's refusal to apply *DelCostello* in this case is in square conflict with the rulings of these other courts.

B. The Eighth Circuit's decision is also irreconcilable with the federal labor policies that led this Court to adopt the *DelCostello* rule in the first instance:

1. The application of laches to claims for relief under the federal labor laws, such as the order compelling arbitration under § 3 of the Railway Labor Act in this case, is contrary to the "national interest in uniformity

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Eleventh of the Railway Labor Act); *International Ass'n of Machinists* v. *Aloha Airlines*, 790 F.2d 727, 734 (9th Cir. 1986) (applying *DelCostello* to claim that employer violated Railway Labor Act status quo requirements.

[14] The Seventh Circuit has stated in dictum that it would not apply the *DelCostello* limitations rule in actions to compel labor arbitration, although that court would apply an alternative limitations rule and not the equitable doctrine of laches. See *Niro* v. *Fearn International, Inc.*, 827 F.2d 173, 177 (7th Cir. 1987); *International Union of Elevator Constructors* v. *Home Elevator, Inc.*, 798 F.2d 222, 229 n.7 (7th Cir. 1986).

in industrial [labor-management]relations" that is one of the principle bases of the *DelCostello* rule.[15] "[R]esort to the doctrine of laches, which adds complex factual considerations to each controversy, can create in every case a previously unknown period" and "could result only in uniform uncertainty." [16] Its application is inconsistent "with the policies of certainty and uniformity" under the federal labor laws. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 435-36 (1965) (rejecting application of laches, rather than limitations, to railroad employees' claims under Federal Employers' Liability Act).[17]

2. The Eighth Circuit's rejection of the *DelCostello* limitations rule in favor of the indefinite rule of laches is likewise irreconcilable with the "national interest" in

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[15] *Mitchell, supra*, 451 U.S. at 66 (Stewart, J., concurring and advocating the result ultimately adopted in *DelCostello*); see *DelCostello*, 462 U.S. at 171-72; *Burnett* v. *Grattan, supra*, 468 U.S. at 52 n.14.

[16] *International Union of Operating Engineers* v. *Fishbach & Moore, Inc.*, 350 F.2d 936, 937 (9th Cir. 1965) (rejecting argument that laches, rather than limitations, was applicable to action under § 303 of the Labor Management Relations Act).

[17] To be sure, in cases that did not involve federal labor laws and the need for uniformity thereunder, the Court has approved the application of laches to federal statutory claims for relief that is deemed "equitable," rather than "legal." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946); *Russell* v. *Todd*, 309 U.S. 280, 289 (1940). But that rule does not support the decision below. It has long been established that when "rights and remedies are dependent on * * * acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the Federal courts, must be determined by the essential character of the case, and *unless it comes within some of the recognized heads of equitable jurisdiction it must be held to belong to the other.*" *Van Norden* v. *Morton*, 99 U.S. 378, 380 (1878) (emphasis added). An order compelling arbitration is plainly not "within" any of the "recognized heads of equitable jurisdiction," for traditionally such relief was unavailable in a court of equity. See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-21 & n.1 (1924) (quoting Story, *Equity Jurisprudence*, § 670 at 821).

fostering stable labor relations through the "relatively rapid final resolution of labor disputes" and the "finality of private [labor] settlements." *DelCostello*, 462 U.S. at 168, 171. Indeed, this case provides a graphic example of how, as the Court observed in *DelCostello*, labor-management relations can be disrupted and " 'could easily become unworkable' " if settled arrangements that have governed the parties' rights " 'could suddenly be called into question * * * years later.' " 462 U.S. at 169.[18]

The respondent employees waited many months, and in some cases years, to challenge the hiring decisions and seniority allocations that were made to accomodate former Rock Island employees when C&NW commenced operations on Rock Island lines. Those arrangements have now been in place more than six years. All parties concerned—C&NW, its employees, former Rock Island employees not hired by C&NW in 1981, and the unions—have structured their operations and lives accordingly. Yet the court of appeals deemed it appropriate to order arbitrations to reopen the hiring and seniority issues, to permit the respondent employees to argue that they are entitled to C&NW positions with "dovetailed" seniority greater than that of many employees who were with C&NW before it commenced operations on Rock Island lines in 1980. The disruptive potential of that decision is enormous. "Jobs, as well as seniority, are at stake," because seniority determines "who gets or who keeps an available job." *Humphrey* v. *Moore*, *supra*, 375 U.S. at 346-47. Dovetailing will result in the layoff of longstanding C&NW employees who have relied on the seniority implementing agreements negotiated between 1980 and 1982, while newer employees formerly employed by the Rock Island exercise their enhanced seniority to hold available C&NW jobs. *Id.* at 339. The former Rock Island employees cannot be granted the relief they seek ex-

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[18] Quoting *Mitchell*, *supra*, 451 U.S. at 63-64 (Stewart, J., concurring).

cept at the expense of other C&NW employees. Thus, even if the original allocation of jobs and seniority ought to have been different, unravelling arrangements that have been in place for so long would bring a whole new bundle of difficulties for the railroad and the unions, along with harsh inequities for other C&NW employees.

The important national interest in stability of labor-management relations calls for a clear and uniform statute of repose for disputes committed to labor arbitration—particularly where such vital issues as job security and seniority are at stake—that will encourage aggrieved parties to bring their claims promptly while there remains a realistic hope of resolving such disputes effectively, fairly, and peaceably. *DelCostello*, and the decisions of other courts of appeals applying it to actions to compel arbitration, have that healthy effect. The Eighth Circuit's contrary decision encourages the very destabilizing effects that this Court sought to avoid in *DelCostello*, and warrants review by this Court.

II. The Decision Below, If Correct In Holding That Laches Is Applicable, Also Presents The Unsettled Question Whether Such Equitable Defenses To Arbitration Are Themselves Arbitrable

C&NW submits that this Court should review the holding below that laches rather than the *DelCostello* limitations rule governs timeliness in labor arbitration. If that holding is correct, however, the decision below presents a second question: whether courts have jurisdiction to decide if laches is a bar, or whether that is a matter for arbitrators to decide. The court below sent the laches defense to the arbitrators, but then encroached seriously on the arbitrators' jurisdiction by telling them what to consider in deciding the issue. (App. 42a).[19]

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[19] The court of appeals ordered that:

> "In deciding this issue, the arbitrator is directed to take into account the following factors. First, the arbitrator should consider the delay in seeking redress caused by the closing of

This Court has held that " 'procedural' questions which grow out of [an arbitrable] dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964). Later cases, however, have raised the question whether the rule of *Wiley* applies where such procedural issues do not depend on the interpretation of the labor agreement that is committed to arbitration. See, *e.g.*, *Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 490 (1972); *Jones Motor Co.* v. *Chauffeurs, Teamsters & Helpers Local Union No. 633*, 671 F.2d 38, 43 (1st Cir. 1982); *Reid Burton Constr., Inc.* v. *Carpenters District Council*, 535 F.2d 598, 603 (10th Cir. 1976). The courts of appeals that have held that the six-month *DelCostello* limitation is applicable to suits to compel arbitration also have decided whether that period had lapsed.

In *Flair*, *supra*, this Court granted certiorari to determine whether equitable procedural defenses to arbitration —a laches defense in that case—that do not depend on

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the Rock Island locals by various internationals. In this regard, the arbitrator should determine whether the former Rock Island employees were adequately informed of their rights under RITEA and the March 4th Agreement. Specifically, he should determine whether there were false assurances made by union representatives to the effect that Rock Island grievances would be redressed and the effect such assurances might have had in delaying action by the Rock Island employees.

"Second, the arbitrator should take into account the cumulative effect of the serious unfair representation by the internationals in terms of the March 4th appellants. Not only did the unions act unfairly in the negotiation of the implementation agreement of the [*Newton*] ground service employees, but they also did not properly represent the former Rock Island employees in the arbitration. This unfairness by the internationals to the March 4th appellants may have convinced the [other employees] that it would be futile to process their claims through conventional channels because they believed they could not rely on their union representatives to adequately represent their interests." (App. 42a).

the interpretation of a labor agreement are arbitrable under *Wiley*. 406 U.S. at 490-91. The Court did not decide the question whether such "extrinsic" equitable questions are arbitrable as a general matter, however, because the parties had agreed to submit "any dispute" between them to arbitration, not just disputes as to the interpretation or application of the collective bargaining agreement, and thus the laches question there was expressly committed to arbitration by the particular agreement. *Id.* at 491.

The question left unanswered in *Flair*—whether "extrinsic" equitable issues are to be decided by the court or the arbitrator where arbitration is expressly provided only for disputes as to the "interpretation or application" of the collective bargaining agreement, as is the case here under § 3 of the Railway Labor Act and under most private labor arbitration agreements—has not been decided by this Court. It is presented in this case, if laches indeed governs the availability of labor arbitration, because the question whether the employees' claims under the March 4 Agreement and RITEA are barred by laches does not require interpretation of either the agreement or RITEA.

Whatever the ultimate disposition of that question, we submit that the court below committed reversible error when it sent the laches issue to the arbitrators with detailed instructions directing them what to consider in deciding the issue. If laches is a matter for arbitrators to decide, then the court erred in that partial usurpation of the arbitrators' jurisdiction. It is well-settled that the jurisdiction of arbitrators under § 3 of the Railway Labor Act is "exclusive," [20] and on at least one occasion this Court has recognized that resolution of extrinsic equitable issues is "certainly" within that exclusive jurisdiction. *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 93

[20] *E.g.*, *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972).

(1978) (upholding § 3 arbitrator's jurisdiction to determine whether an employee's failure to comply with a contractual limitations period for grievance arbitration was excused by equitable tolling).[21] If, on the other hand, laches is a matter for judicial determination, then the court below erred in leaving the ultimate resolution of the issue to the arbitrators.

In any event, this case squarely presents the question whether extrinsic equitable defenses to arbitration are to be decided by courts, by arbitrators, or by some entirely unsatisfactory amalgamation of the two. That question warrants review, although it would be reached only if the Court should reject our contention under the first question presented that timeliness here is not governed by laches but instead by the *DelCostello* limitations rule.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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December 13, 1988

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[21] See also *International Ass'n of Machinists* v. *Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985) ("equitable defenses to arbitration" under § 3 of the Railway Labor Act are for arbitrators to decide).

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1369

L. LEE BEARDSLY,
Appellant,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

FRANCIS E. AMIOT,
Appellant,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

No. 86-1370

JOHN E. REECE, *et al.*,
Appellants,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

No. 86-1372

JACK L. CHAMBERS, *et al.*,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Appellees.

No. 86-1373

ROGER L. SWIFT; OSCAR D. OVERTON; W. R. URTON; ROBERT W. LUTH; MARK R. POMERY; DAVID G. DICKEY; TERRY B. TURVOLD and CLYDE R. THOMAS,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; UNITED TRANSPORTATION UNION, an unincorporated labor organization; and THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization,
Appellees.

No. 86-1374

HAROLD L. KING; JAMES L. KNOX; STEVEN ARTHUR NEWTON; GEORGE R. ETHERTON; LARRY L. WILLIAMS; JOHN F. KEITH; and JOSEPH A. RUSH,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY and THE UNITED TRANSPORTATION UNION, an unincorporated labor organization,
Appellees.

No. 86-1950

VANE NEWTON; ROBERT R. BAILEY; WAYNE A. MOORE; ROBERT L. DUNCAN; HAROLD E. JOHNSON; DONALD L. KIDD, SR.; H. L. KIDD, JR.; B. J. RUDE; MAX A. EADS; JACK E. BROWN; MILTON E. CAPPS; WILBUR STANTON; J. W. BURKE, JR.; E. D. SNYDER; DANIEL V. MIDDOUR; DONALD P. MCCALEB; SAM H. DEAN; DONALD E. BISGAARD; ROBERT W. SHANER; LADON E. CRANE; ROGER L. ROTHAMEL; ARNOLD M. SCHEEL; FRANK M. RAMEY; A. M. MCQUADE; LLOYD G. ANDREWS; RICHARD D. THORSLAND; JOHN R. VINCENT; STEPHEN R. EARLY; LEO T. SEEHAN; and RICHARD A. NITCHER; JOHN E. BEGHTOL; DENNIS E. CHAPLIN; PAUL W. STRAWN; MAX R. WILLIAMS; DAVID YACKLE; FRANCIS E. AMIOT; JAMES F. RAMSEY; ALLAN P. SHERLING; JERRY E. PAYNE; RICHARD A. CLARK; KENNETH W. BREVIG; STEPHEN D. ROSENTANGLE and WILLIAM H. ROSENTANGLE, *Appellants*,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY; UNITED TRANSPORTATION UNION, an unincorporated labor organization; and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization, *Appellees*.

No. 87-1325

ANGELINE V. BOLL,
ROBERT J. TOLLAKSON and DENNIS L. STOWE,
Appellants,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated labor organization, *Appellees*.

Appeal from the United States District Court
for the Southern District of Iowa

Filed: June 15, 1988

Before HEANEY, BOWMAN and WOLLMAN, Circuit Judges.

ORDER

This matter comes before us on petition for rehearing and suggestion for rehearing en banc. After consideration of the various petitions, we vacate our opinion dated January 8, 1988, and substitute this revised opinion in its stead.

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
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v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; UNITED TRANSPORTATION UNION, an unincorporated labor organization; and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization, *Appellees.*

Appeal from the United States District Court
for the Southern District of Iowa

Submitted August 31, 1987

Filed: June 15, 1988

Before HEANEY, BOWMAN and WOLLMAN, Circuit Judges.

HEANEY, Circuit Judge.

I. OVERVIEW

One hundred fifty-eight former employees of the Chicago, Rock Island and Pacific Railroad (Rock Island or Rock Island Railroad) appeal from decisions of the United States District Court for the Southern District of Iowa dismissing or denying their claims against the Chicago & Northwestern Transportation Co. (CNW) and four railroad labor organizations.[1] The suits allege violations of a labor protective agreement and a United States statute, both designed to protect the job status of the former Rock Island employees.

We affirm the district court insofar as it dismissed several of the actions for lack of jurisdiction. We reverse the district court's denial of appellants' request to vacate an arbitration decision between the CNW and the United Transportation Union (UTU) regarding former Rock Island ground service employees. We find that the terms of the October 22, 1980 seniority implementing agreement as affirmed by the arbitrator are invalid and direct

[1] The United Transportation Union, the Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees.

that they be renegotiated. Finally, we hold the remaining employees have a right to arbitration, subject to the right of the CNW and the appellee unions to assert the defense of laches.

II. FACTUAL BACKGROUND

A. Attempted Reorganization, Interim Operation and Purchase of Rock Island Railroad

In 1975, the Rock Island Railroad commenced reorganization proceedings. These efforts were unsuccessful. In September of 1979, the Interstate Commerce Commission (ICC) concluded that Rock Island had insufficient cash assets to continue its operations "in the face of national transportation requirements." On March 18, 1980, the ICC granted the CNW authority to conduct temporary operations over certain Rock Island lines from March 24 until May 31, 1980.[2] The ICC subsequently authorized the CNW to continue providing interim service over those lines until June 20, 1983, at which time a United States Bankruptcy Court approved the sale by the Rock Island trustee to the CNW of the lines upon which it had been conducting interim service.

B. The March 4th Agreement

On March 4, 1980, thirteen railroads who were operating or contemplating operations on Rock Island lines, including the CNW, entered into a labor protective agreement[3] with national representatives of rail labor orga-

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[2] During this period, several other railroads were also given authority to conduct operations over other parts of the former Rock Island lines. *See Kansas City Terminal Ry. Co.—Directed to Operate Over—Chicago, R.I. & P. R.R. Co., Debtor*, 360 I.C.C. 289, 290 (1979).

[3] This agreement, entitled Labor Protective Agreement between Railroad Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organi-

nizations, including the national representatives of appellee unions involved in the present action.

The March 4th Agreement was designed to ease a potentially troublesome transition. The acquiring railroad agreed to make accommodations in terms of providing rights of first hire and seniority to the employees of the acquired company. In exchange, the international unions agreed to assure labor peace during the transition. Specifically, the stated purpose of this agreement was to provide:

> a fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner, as set forth herein, immediately upon authorization for such operation.

March 4th Agreement at 1.

Article II of the Agreement provides that the purchasing carrier shall determine by craft its necessary additional manpower requirements "due to its taking over . . . [the] Rock Island lines." *Id.* at 3. The acquiring carrier further agreed to provide a detailed explanation of these needs, to "discuss" its requirements with representatives of the crafts employed by both the acquiring and acquired railroad, and to extend to employees of the acquired railroad the right of first hire in all work stemming from the acquisition. *Id.* This right of first hire was to accrue to employees in order of their seniority.[4]

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zations Operating through the Railway Labor Executives' Association, is reproduced in 1 Joint Appendix 131.

[4] Specifically, Article II of the March 4th Agreement provides:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over [the]

Article II, section 9, of the Agreement sets forth procedures to determine job seniority for former Rock Island employees hired by the CNW. It states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

C. The Rock Island Railroad Transition and Employee Assistance Act—RITEA

On May 30, 1980, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act (RITEA) Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified as amended at 45 U.S.C. § 1001). The purpose of this act was twofold: (1) to protect the interests of former Rock Island employees and (2) to protect the railroads against labor strife and ensure continued operation of the lines formerly controlled by the Rock Island railroad.[5]

Rock Island [line]. * * * Each of the determinations shall be discussed with representatives of the crafts on purchasing carrier and on the Rock Island * * * with detailed explanations to them of the basis for each determination prior to serving notice under paragraph 4 hereof.

As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island * * * the first right of hire * * * dependent on whose trackage is involved and consistent with the purpose of Section 8 of the Milwaukee Railroad Restructuring Act. * * * In carrying out the purposes of this section, the purchasing carriers shall first utilize existing seniority rosters applicable to the appropriate craft and seniority district of the lines and territories involved in fulfilling employment needs in connection therewith.

[5] Under the "Congressional Findings" section, the Act states:

(1) uninterrupted continuation of service over Rock Island lines is dependent on adequate employee protection provisions

Section 105 of the Act, 45 U.S.C. § 1004, entitled "Railroad Hiring," provides a broader right of first hire than the March 4th Agreement. Where the March 4th Agreement limits the right of first hire to work stemming from the acquisition of the Rock Island, RITEA provides a blanket right of first hire to former Rock Island employees.[6] Specifically, it states that former employees of the Rock Island:

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covering Rock Island Railroad employees who are not hired by other railroads;

(2) for those Rock Island Employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;

(3) a cessation of necessary operations of the Rock Island would have serious repercussions on the economies of the States in which such railroad principally operates; and

(4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of vital commuter service.

RITEA § 102, 45 U.S.C. § 1001.

[6] The House conference report accompanying RITEA describes the purpose of Section 105 in the following terms:

SECTION 105—RAILROAD HIRING

Senate Bill.—Section 105 of the Senate bill is based on a similar provision in the Milwaukee Railroad Restructuring Act. *It provides for priority hiring of Rock Island employees unless they are found less qualified than other applicants* or unless such priority hiring would interfere with a carrier's equal opportunity employment obligations.

House Amendment.—The House amendment . . . is also patterned after the Milwaukee Railroad Restructuring Act. It specifically states that rights afforded to Rock Island employees under this section shall be coequal to rights afforded Milwaukee employees.

Conference Substitute.—* * * In general, this section is intended to insure that eligible Rock Island employees will be

> shall, unless found to be less qualified than other applicants, *have the first right of hire by any other rail carrier that is subject to regulation by the [ICC] for any vacancy* that is not covered by [an affirmative action plan].

45 U.S.C. § 1004 (emphasis added).

On January 14, 1983, the arbitration provision of the Regional Rail Reorganization Act, 45 U.S.C. § 797 (c) (g), was amended to subject disputes regarding the right of first hire under RITEA to mandatory arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2543, 2547 (1983). Prior to this time, an action could theoretically be brought in federal court to enforce this right. *See Brotherhood of Locomotive Engineers v. Burlington Northern*, 580 F. Supp. 797 (D. Colo. 1984).

D. Propriety of Implementing Agreements Negotiated Under the March 4th Labor Protective Agreement

1. Factual Background.

To understand appellants' claims concerning the validity of the implementing agreements negotiated under the authority of the March 4th labor protective agreement, it is important to take note of certain circumstances surrounding the negotiation of these agreements. Specifically, the effect of the closing and consolidation of local unions must be understood, as well as obligations imposed on the negotiating unions by their own constitutions.

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hired without delay or discrimination. The successful implementation of this provision depends upon the full cooperation of other carriers.

H.R. Conf. Rep. No. 96-1041, 96th Cong., 2d Sess. 25 (1980) (emphasis added).

a. National Unions Close Down Local Rock Island Locals

Shortly after the March 4th Agreement and RITEA went into effect, the international unions here involved closed down or consolidated many of the locals serving former Rock Island employees. They maintain these closings or consolidations were an economic necessity because members had ceased paying dues. *See* Affidavit of Robert L. Hart, 5 Joint Appendix 1057, 1057-58. The appellants maintain that the closing or consolidation of the locals resulted from a conspiracy among the international unions, the CNW, and the local unions representing CNW employees to undermine the bargaining strength of the former Rock Island employees. *See generally*, 1 Joint Appendix 16-130. As evidence of this, they note that local union officials were unavailable to file grievances and that representatives of the internationals engaged in a pattern of falsely assuring former Rock Island employees that action would be taken on grievances. *Id.* Further, appellants maintain that in the confusion and consolidation, they were not informed of the safeguards, such as the March 4th Agreement and RITEA, enacted to assure their job-related rights. *Id.* Whatever the reasons for the closings or consolidations, they clearly made it more difficult for the former Rock Island employees to understand their rights and to determine whether they were being adequately protected by their internationals.

b. The United Transportation Union Constitution

Article 85 of the United Transportation Union (UTU) Constitution [7] provides that the General Chairman em-

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[7] Article 85 of the UTU Constitution provides in relevant part:

The General Chairman must poll the entire General Committee prior to signing any system agreements and be governed by the majority of the votes cast. The General Chairman must

powered to make a "systems" agreement, such as the implementing agreements involved in the present dispute, must poll the "affected Local Chairmen", i.e. the Chairmen for the CNW employees and the Rock Island employees, prior to signing such an agreement and be governed by the majority of votes cast. Moreover, in negotiating such agreements, the seniority of employees of acquired railroads is to be preserved to "the extent possible." [8] In addition, Article 90 mandates that all intra-union disputes surrounding an acquisition or merger be resolved internally by the union. This ensures that a unified position can be established with respect to these disputed issues and preserves internal union authority over the interpretation of its constitution.[9]

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poll the affected Local Chairmen prior to signing any local agreements and be governed by the majority of the votes cast.

See Joint Appendix 315, 347 (emphasis omitted).

[8] Article 90 of the UTU Constitution provides in relevant part:

> When, through lease, purchase, merger, consolidation or other cause, a line or lines of a carrier or a portion thereof is taken over by another carrier or where, because of establishment of a new line by an existing carrier or for other reasons traffic is permanently diverted from one carrier to another or from one road and/or yard seniority district to another on the same carrier and such affects the seniority rights of employees on such carriers, General Committees of Adjustment shall arrange for a fair and equitable division of the work. *Prior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible.*

See Joint Appendix 315, 348-49 (emphasis added).

[9] Article 90 continues:

> Disputes arising ander this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President. The International President shall promptly assign an officer to assist the General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and

2. Negotiation of the Implementing Agreements

Pursuant to Article II of the March 4th Agreement, the CNW sought to conclude implementing agreements with respect to the relative seniority rights of its employees and the former employees of the Rock Island Railroad it had hired. Although the CNW did involve the union representatives of the former Rock Island employees in preliminary discussions, these representatives were not present when the final agreements were reached, were not parties to these agreements, and had virtually no control over the terms of these agreements.

Final implementing agreements with engine service employees represented by the Brotherhood of Locomotive Engineers (BLE) and the UTU were signed by the CNW General Chairmen for the BLE and the UTU on February 16, 1982. *See* 7 Joint Appendix 1399.

On October 22, 1980, the CNW and two UTU General Chairmen of the Committee of Adjustment for the CNW—G. R. Maloney and Thomas Q. Ryan—signed an interim agreement. This agreement determined the relative seniority rights of former Rock Island employees and employees of the CNW in terms of ground service work.

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recommendation to the International President who, in turn, shall decide the dispute.

Any local or member of a local affected by an action or decision of a Chairman, Sub General Committee or General Committee, or by the decision of the International President with respect to the Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the action or decision. The Chairman, Sub General Committee, General Committee, or International President, as the case may be, shall be allowed thirty (30) days from the date the appeal is filed in which to reply to the appeal. The parties involved in an appeal shall exchange copies of the appeal and reply to the appeal.

3. Arbitration of UTU Rock Island Ground Service Employees

a. The Arbitration Proceeding

On April 15, 1981, the General Chairman of the Committee of Adjustment for UTU Rock Island, Ralph Tambaro, sent a letter to the CNW objecting to the October 22, 1980 interim implementing agreement insofar as it related to ground service employees. *See* 7 Joint Appendix 1437. He objected, in part, because the agreement had been reached without the participation of the union representatives of former Rock Island employees and, in part, because it failed to give Rock Island employees seniority rights to which they felt entitled under the March 4th Agreement. Tambaro demanded arbitration pursuant to Article II, section 9(b) of the March 4th Agreement. On May 4, 1981, the CNW received a second letter from Fred Hardin, the International President of the UTU, seeking to invoke the same arbitration procedure on behalf of former Rock Island ground service employees. On May 18, 1981, Hardin by letter indicated that R.M. Crago, UTU International Vice President, would represent the UTU's Rock Island employees in the arbitration, but would not act as a representative of the international union.

Next, the CNW and CNW-UTU filed suit to stop this arbitration and succeeded in delaying it for approximately one and one-half years. *See Chicago and Northwestern Transportation Co. v. United Transportation Union*, C.A. 81-2472 (D.D.C.); *see also* Supplemental Affidavit of Robert W. Schmiege, 7 Joint Appendix at 1496. Thereafter the arbitration went forward. The CNW and representatives of the Rock Island and the CNW ground service employees participated in the arbitration, which was conducted between February 23 and 25, 1983, by a neutral arbitrator appointed by the National Mediation Board. *See* Arbitration Board No. 406,

Matter of Arbitration Between the Chicago and Northwestern Transportation Company and The United Transportation Union, at 2 (May 20, 1983) (Arbitration) (*see* 2 Joint Appendix 267). Although the UTU constitution required the union to enter the arbitration with a unified position, the arbitration consisted of a contest between the Rock Island UTU representatives and the CNW-UTU representatives, with the international union paying no significant independent or authoritative role.

b. The Tucumcari Case

Shortly after the matter was submitted to arbitration, but several months before the arbitrator rendered a decision, a relevant internal dispute was being resolved within the UTU. In UTU Board of Appeals Case No. 64, File 8-8-54 (March 11, 1983) (*Tucumcari*) (*see* 2 Joint Appendix 441), former employees of the Rock Island challenged an implementing agreement quite similar to those involved in the case before us.

In *Tucumcari*, a segment of the former Rock Island railroad called the Tucumcari line had been purchased after a period of interim operation by the St. Louis Southwestern Railroad (SSW) on March 24, 1980. Pursuant to the terms of the March 4th Agreement, a subsequent implementing agreement was reached purporting to establish a seniority scheme for the former Rock Island employees.

The implementing agreement was signed by General Chairman R. H. Arnett, on February 23, 1982. Arnett was the representative of the SSW-UTU, the acquiring company's union, and had never represented Rock Island employees. As in the present case, the agreement gave former Rock Island employees seniority dates as of their first day of work for the SSW.

Two former Rock Island employees, J. W. Volkman and J. T. Kelso, brought an internal appeal within the

UTU. They alleged that the implementing agreement was contrary to the terms of the March 4th Agreement. They argued, *inter alia*, that the agreement was improper because Arnett represented only employees of the acquiring company and not the Rock Island employees. They also maintained that the March 4th Agreement contemplated greater seniority rights than were provided by the February 23, 1982 implementing agreement.

The Board of Appeals held for Volkman and Kelso and, in reforming the terms of implementing agreement, stated that "all employee representatives" should participate in the negotiation of implementing agreements. *Id.* at 16. Second, the Board found that the former Rock Island employees were entitled to a seniority date as of the day they were hired by the Rock Island. Specifically, the Board stated:

> In the case of acquisition, prior rights are of paramount concern. To place a termination date on those prior rights would not only be a travesty of justice but also would contravene the very concepts of seniority and prior rights.

Id. at 18. The Board continued:

> This Board also finds the former employees should be given the seniority dates of their earliest employment date, i.e., the seniority date carried on the Rock Island. Without extensive elaboration, we feel this would not be too hard to accomplish.

Id.

c. The Arbitrator's Decision

The arbitrator issued his award in the ground service employees' dispute on May 20, 1983. Without notice of the UTU's centrally announced position in *Tucumcari* and without reference to the UTU Constitution, the arbitrator declared that the October 22, 1980 implementing agreement met the requirements of the March 4th Agreement. Moreover, at the arbitration, the Rock Island em-

ployees contend they were inadequately represented, under the terms of the March 4th Agreement, in the negotiation of the implementing agreements. The arbitrator simply deferred to the position of the acquiring union. In his analysis of this claim, the arbitrator characterized this very serious situation as merely "unfortunate." Specifically he stated:

> Full opportunity was given to all representatives of these employees to further discuss this matter with the Carrier in order to reach an implementing agreement. Unfortunately, with respect to the crafts here involved only the C&NW-UTU representative reached an understanding with the Carrier. This does not mean, however, that the UTU representatives of former Rock Island employees were not afforded the fullest opportunity to make their case with respect to the allocation of additional manpower.

Arbitration at 4.

Thus, the arbitrator inexplicably appeared to believe, because the Rock Island employees could "talk" to the carrier, that agents of the acquiring unions could properly and adequately represent the former Rock Island employees in the seniority negotiations. In doing so, he never noted that the agents of the acquiring unions represented constituencies with absolutely adverse interests.

Finally, in contravention of the intent of the March 4th Agreement, the UTU Constitution, and *Tucumcari*, the arbitrator declared that any notion of prior rights or dovetailing of seniority would be improper and that employees of bankrupt railroads were only entitled to limited relief. He therefore affirmed, with a few insignificant modifications, the terms of the October 22, 1980, implementing agreement.

Having set forth the factual background of the present dispute, we turn to resolving the specific legal claims of the parties.

III. JURISDICTIONAL ARGUMENTS COMMON TO ALL APPELLANTS

A. Overview

All appellants in this action assert violations of the March 4th Agreement and RITEA. With one exception, they sought redress for their grievances in federal court without first resorting to arbitration. Appellants outline several legal theories in support of federal court jurisdiction. Each is unavailing.

B. Section 105 of RITEA Does Not Create a Right of Action in Federal Court

First, the former Rock Island employees claim that Section 105 of RITEA, 45 U.S.C. § 1004, adopted May 30, 1980, creates a right of action in Federal court. Section 105 states:

> (a) Each person who is an employee of the Rock Island Railroad on August 1, 1979, and who, prior to January 1, 1981, is separated or furloughed (other than for cause) from his employment with such railroad * * * as a result of a reduction of service by such railroad * * * shall, unless found to be less qualified than other applicants, have the first right of hire by any other rail carrier that is subject to regulation by the Commission for any vacancy [not covered by an affirmative action plan].

On January 13, 1983, 45 U.S.C. § 797(c)(g) was amended to subject this right to arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2545, 2547 (1982). The amended statute provided:

> Any dispute, grievance or claim arising under * * * section 1004 of this title (45 U.S.C. sec. 1004) *shall be subject to resolution in accordance with the following procedures*:

> (1) Any employee with such a dispute, grievance, or claim may petition the [The Railroad Retirement] Board to review and investigate the dispute, grievance, or claim.
>
> (2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under * * * section 1004 of this title may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.
>
> (3) In the case of any violation of * * * section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

45 U.S.C. § 797(c)(g) (emphasis added).

Based on the foregoing, the appellants claim that the language "shall be subject to" is permissive rather than mandatory. We agree fully with the district court and find that the language of 45 U.S.C. § 797(c)(g) is clearly mandatory and that appellants' arguments in this regard are frivolous.

C. The Rock Island Employees Do Not Have a Vested Right to an Action in Federal Court

The appellants also contend that during the interim period between the date RITEA became law on May 30, 1980, and the date the right of first hire became subject to arbitration on August 13, 1983, the Rock Island employees had a vested right to bring an action in federal district court under 28 U.S.C. § 1331 that could not be eliminated by a later amendment of the law. We disagree.

The Supreme Court has clearly stated:

> [W]hen the jurisdiction of a cause depends upon a statute the repeal of the statute takes away jurisdiction. And it is equally clear, that where a jurisdiction conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring jurisdiction.

Merchants' Insurance Co. v. Ritchie, 72 U.S. (5 Wall. 541, 544-45 (1867).

Moreover, a closely related issue was decided in the case of *Brotherhood of Locomotive Engineers v. Burlington Northern*, 580 F. Supp. 797 (D. Colo. 1984). There the district court was faced with the issue of what happened to pending claims in federal district court after 45 U.S.C. § 797(c)(g) had been amended to require arbitration for these claims. The court, after thorough review of the authorities, found that claims brought correctly in federal court before the enactment of the arbitration provision lacked jurisdiction after its effective date.

Clearly, jurisdiction was withdrawn in the present case by the amendment of 45 U.S.C. § 797(c)(g). Appellants' case was not even properly pending in federal court at the time of the amendment. Thus, there is no conceivable basis for jurisdiction under any vested rights theory.

D. Section 122 of RITEA Does Not Create A Private Right of Action

The former Rock Island employees next contend that section 122 of RITEA creates a cause of action in federal court. We disagree.

Section 122 of the Act, 45 U.S.C. § 1017, provides:

> The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of a carrier which * * * was the subject of a proceeding pending under section 77 of the

> Bankruptcy Act or under subchapter IV of Chapter 11 of Title 11. The use of such tracks and facilities shall be under the terms of compensation as the carriers establish between themselves, or if the carriers are unable to agree under such terms of compensation as the Commission finds to be reasonable. * * *
>
> In carrying out the provision of this section, the Commission shall require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission.

Section 105 already creates a cause of action. *See* 42 U.S.C. § 1004. It is unlikely that, without some additional special purpose, Congress intended to create a duplicative action. Moreover, the language of section 122 only authorizes the ICC to act and does not support an interpretation which would provide jurisdiction for individual suits.

In a related argument, appellants contend that section 122 and 28 U.S.C. § 1336 [10] together create federal court jurisdiction over their claims. We again disagree.

Section 1336 of 28 U.S.C. permits the federal courts' jurisdiction over causes of action elsewhere enumerated. It says nothing about causes of action based on alleged violations of section 122 or of ICC orders issued pursuant thereto. Moreover, the Supreme Court has repeatedly held that jurisdictional statutes such as 28 U.S.C. § 1336 do not of themselves establish a private right of action. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979);

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[10] 28 U.S.C. § 1336 provides in relevant part:

> (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).

E. Plaintiff's Unfair Representation Claims are Barred by the Statute of Limitations

In terms of the unfair representation claims brought by the former Rock Island employees, we agree with the district court, both in that these claims are governed by the six-month statute of limitation set forth by the Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

Thus, the claims of only one group of appellants have been preserved. The statute of limitations on the ground service employees suit began to run on May 20, 1983, the date the arbitration award was issued. They brought their action on November 18, 1983, two days before the expiration of the six-month limitation period. Thus, their claims are preserved. *See Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1232-33 (8th Cir. 1987).

IV. REMEDIES AVAILABLE TO APPELLANTS

A. Overview

Given the fact that the appellants' substantive claims cannot properly be brought in federal court, we now turn to the task of determining what remedies, if any, remain available to them.

For purposes of resolving this question, the 158 individual claimants involved in the present action are best divided into three categories: March 4th Agreement appellants, non-hire appellants, and new-hire appellants.

1. The March 4th Agreement Appellants.

The March 4th Agreement appellants are thirty-three individuals hired by the CNW who claim they were not given adequate seniority under the March 4th Agreement. This group can be subdivided into two classes: the

ground service employees and the engine service employees.

a. The Ground Service Employees

Nine of the thirty-three March 4th appellants were former ground service employees of Rock Island represented by the UTU. These employees were subject to the October 22, 1980 interim implementing agreement. They claimed that this implementing agreement was improper for several reasons and went to arbitration to protest its terms. Their claims were rejected by the arbitrator.

b. The Engine Service Employees

Twenty-four of the March 4th appellants were former engine service employees represented by both the UTU and the BLE. These employees were subject to two February 16, 1982 implementing agreements reached between the CNW and their respective unions. These employees, like the ground service employees, claim that the implementing agreements governing their seniority were improper. These appellants, however, did not take their protests to arbitration.

2. The Non-Hire Appellants

This group comprises eighty-one employees who applied for employment with the CNW in 1980 or 1981 for available positions but were not hired. Instead, the CNW hired persons without prior service on either the Rock Island or the CNW. This group claims they had a right to be hired both under the March 4th Agreement and section 105 of RITEA, 45 U.S.C. § 1004.

3. The New-Hire Appellants

This group is made up of forty-four former Rock Island employees taken on by the CNW as "new hires" for work the CNW claims did not arise out of the acquisition of the Rock Island. These appellants claim a deprivation of seniority rights under the terms of the March 4th Agreement.

B. The Arbitration of the Ground Service Appellants

The March 4th ground service employees contend that the arbitration proceeding of May 20, 1983, was improper and must be vacated. We agree.

1. The Duty of Fair Representation

In order to establish unfair representation by a union, the claimants must show that the union's representation was "perfunctory, arbitrary, discriminatory, or in bad faith." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979). A union representing a majority bargaining coalition owes a strict supplementary duty of fair representation to the position of a minority group within the coalition with interests adverse to the majority. In *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Supreme Court held "that the organization chosen to represent a craft is to represent all of its members, the majority as well as the minority and is to act for and not against those whom it represents." *Id.* at 202. Further, in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Court declared:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

This duty to the interests of an adverse minority is perhaps most thoroughly delineated in the case of *Jones v. Trans World Airlines*, 495 F.2d 790 (2d Cir. 1974). In *Jones*, the Second Circuit found a breach of the duty of fair representation by a union representing an adverse minority group sufficient cause to set aside the seniority provisions of a collective bargaining agreement.

In *Jones*, Trans World Airlines (TWA) entered into a collective bargaining agreement with the International

Association of Machinists and Aerospace Workers International Union (IAM) in January of 1970. Prior to this time, certain employees titled "passenger relations agents" had not been asked to join a union and were not required to join a union under the union security clause in effect at that time. Moreover, prior to that time, the collective bargaining agreement provided that all employees would hold job seniority status as of the date of their job assignment.

Under the terms of the new agreement, the work of passenger relations agents was included within the jurisdiction of the IAM in the "guards" bargaining unit. TWA and IAM further agreed that the passenger relations employees would be treated as new hires for the purpose of seniority. The effect of this was to make any IAM members who wished to transfer to the job of passenger relations agent senior to all non-IAM employees who had previously held these positions, despite the fact that the old contract fixed seniority by the date of assignment to a given job classification.

In June of 1970, TWA announced that the passenger relations jobs were guard vacancies. Twelve members of the IAM guard unit bid for the jobs and were given seniority as of the date they assumed the duties of passenger relations agents, i.e. June 22, 1970. The rest of the jobs were filled by non-IAM workers who were then holding these positions. These workers were given seniority as of the dates they joined the union, generally sometime in July or August of 1970. When the new union members found out they had less seniority than the twelve newcomers to their department, they brought an action in district court claiming that the unions had unfairly represented them. The district court denied relief.

The Second Circuit reversed. The court found that the only characteristic that distinguished the new union members from the employees afforded greater seniority was

the fact of union membership prior to the January 1970 collective bargaining agreement. The court termed this sort of discrimination in the negotiation of seniority "arbitrary and invidious" and found that such conduct "violate[d] the unions' duty to represent fairly all members of the bargaining unit." *Id.* at 797.

The court declared that, while the standard for unfair representation generally involves arbitrary, perfunctory, or discriminatory conduct, the union must meet a higher standard when the interests of an adverse minority are affected. Specifically, the court said the union representative must provide "substantive and procedural safeguards" for the minority group.

> [I]t is evident that a union may breach its duty of fair representation by actions other than those motivated by anti-minority animus. While it is true that situations in which a union violates its duty have been indentified by such phrases as "hostile discrimination," * * * and "arbitrary, discriminatory," or "bad faith" conduct, * * * these phrases do not delimit the specific categories of violations of the duty of fair representation. They only serve to emphasize that the union has broad discretion to adjust the demands of competing groups within its constituency as long as it does not act arbitrarily. * * *
>
> *In the instant case, the IAM's duty to the appellants was broader than a mere duty not to negotiate the 1970 contract seniority provisions out of hostility toward them. The objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit.*

Id. at 798 (citations omitted and emphasis added).

The court then declared that the seniority of the former passenger relations employees should be determined as of the date of original job assignment.

2. Impropriety of the October 22, 1980 Interim Implementing Agreement

The October 22, 1980 implementing agreement was negotiated by representatives of CNW employees in contravention of the terms and the purpose of the March 4th Agreement and it was thus hopelessly flawed.

The March 4th Agreement was designed to fill a practical necessity by easing the potentially troubled transition period during which the CNW acquired the Rock Island Railroad. The purpose of the March 4th Agreement was to provide the CNW labor peace in exchange for accommodation in terms of jobs and seniority for the former employees of the Rock Island Railroad. Thus, the terms of the March 4th Agreement were not a gratuitous gesture by the CNW to the former Rock Island employees, but represented "bargained-for" consideration in the truest sense of the term.

When a highly unionized rail carrier takes over the trackage of another highly unionized carrier, whether by merger or acquisition, unless assurances are made to the employees of both acquiring and acquired railroads, labor dislocation and strife is likely to be bitter and endemic. First, the employees of the acquired company face the personally devastating prospect of losing long-standing valued seniority rights and, more importantly, of losing jobs. In such a period, displaced employees are likely to force the representatives of their local and international unions into using pressure tactics to force the acquiring company into some sort of an accommodation, both in terms of rights to hire and job seniority. The acquiring companies are very susceptible to this sort of pressure, because they themselves are highly unionized—generally with the same unions as the acquired company. In addition, they are dependent on the skilled labor force which the union dominates.

The complication, however, does not end here. On the other side of the coin, the incumbent employees of the

acquiring companies are likely to feel threatened by the hiring of new employees with advanced seniority rights and are likely to demand some sort of firm assurance, both in terms of their job status and vested seniority rights.

To settle these conflicts, a common and well-established practice in acquisitions or mergers is to engage in some sort of dovetailing of seniority. *See Humphrey v. Moore*, 375 U.S. 335, 347 (1964) (The integration or dovetailing of seniority is "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption.").

In terms of seniority allocation for former Rock Island employees hired by acquiring railroads, section 9 of the March 4th Agreement sets forth procedures to determine job status. Specifically, it states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

March 4th Agreement at 7.

Carefully parsing the words of this difficult phrase and reviewing alternative interpretations of it, it is clear that any correct construction must include the representatives of the former Rock Island employees in these negotiations.

One construction would have this phrase mean that an "agreement" would be reached at a future time with regard to seniority allocation as amongst the combined groups of preacquisition CNW employees and former employees of the Rock Island recently employed by the CNW. This construction would not in any way specify the parties to the potential agreement and would thus leave the selection of these parties completely within the

control of the CNW. Such an utter abdication of power over selecting the parties to determine seniority, however, would result in the complete loss of control over seniority allocation and thus runs contrary to the purposes of the Agreement, i.e., to protect the interests of the former Rock Island employees and to avoid labor strife in the critical transition period. Moreover, if the purpose of the agreement was to give the company the power to determine seniority, it is likely that the agreement would simply have said this.

A second construction, implicitly urged by appellees, would have this clause create a procedure whereby seniority agreements would be reached between the CNW and representatives of the CNW's unions. The text, however, does not support such a construction. Further, the March 4th Agreement was designed to protect the seniority rights of former Rock Island employees. Yet, it is vital to realize that there is no group that would be less inclined to protect the seniority rights of the Rock Island employees than the representatives of the CNW employees. The reason is simple. Any seniority credit given Rock Island employees for work performed while with the Rock Island would adversely affect the seniority rights of the employees of the CNW. Given this, the representatives of the CNW unions could be expected to favor the interests of the pre-acquisition employees, utterly frustrating the purposes of the agreement. Thus, this second construction could not possibly be correct.

The third and correct construction would require the implementing agreements be reached with the *active and significant participation of the representatives of the former Rock Island employees.* Strong support for this construction is found in the March 4th Agreement's purpose, to protect the interests of former Rock Island employees, in the union's constitution, and in *Tucumcari*, which, in delineating internal UTU policy, declared that all em-

ployee representatives should participate in the negotiation of implementing agreements.[11]

3. The Arbitration Proceeding Was Improper

The ground service employee arbitration was fundamentally improper because the arbitrator deferred to an invalid and fundamentally unfair implementing agreement.

The arbitrator clearly based his decision on the October 22, 1980 interim agreement. He declared, deferring to the implementing agreement and the position of the acquiring company's union representatives, without support from the record or any coherent reason, that the Rock Island employees had sufficient participatory rights to ensure the implementing agreement was consistent with the March 4th Agreement. Further, he specifically deferred to the terms of the October 22, 1980 agreement, declaring both that it would be inappropriate to make a redetermination of seniority and that prior rights and dovetailing were not contemplated by the March 4th Agreement.

Next, although not necessary to our holding, we note the arbitrator made his determination without an understanding of the requirements of the union's constitution. To conform with the UTU constitution, the union should have entered the arbitration with a unified position and actively sought seniority for Rock Island employees. What happened in the ground service employees' arbitration, however, could not have been more different. The union allowed the claims of the CNW employees with regard to the allocation of seniority—a position contrary

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[11] We recognize that *Tucumcari* did not involve commingled work and realize this fact could possibly have some bearing on its applicability in terms of the specific seniority allocation in this case. However, we believe that *Tucumcari's* central holding—that all employee representatives should participate in the formulation of implementing agreements—is unaffected by this distinction.

to its centrally determined seniority policy—to go unchallenged to the arbitrator. This impropriety strongly contributed to providing a legitimate forum to a position which it had previously determined illegitimate and which otherwise would probably not have prevailed.[12]

4. Conclusion

In *Jones*, the Second Circuit found that the duty of fair representation had been violated when a union preferred long-term members' interests to those of new members. In some intuitive ways this line of conduct by the union might seem justifiable. It might be argued the union owed more loyalty to those long term members than to those employees not yet members of the union. Nevertheless, the court found this conduct to be "arbitrary" and "invidious." Further, the court delineated a clear obligation to represent these future members and to assure them substantive and procedural safeguards in the contract talks.

In terms of the negotiations of the October 22, 1980 implementing agreement, the inherent force of *Jones* cuts powerfully in favor of the Rock Island appellants. First, the former Rock Island employees are in a stronger position to assert unfair representation than the non-union passenger relations agents in *Jones*. While, in a sense, both groups stood poised to become members of the group

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[12] The UTU and CNW contend that the UTU had internally determined Article 90 was not applicable "in cases of partial or total abandonment or liquidation where other carriers purchase or lease the trackage abandoned or liquidated." *See* Supplemental Affidavit of Robert Schmiege, Exhibit 5 at 22. The UTU further contends that the matter was to be "handled in accordance with the arbitration procedures of the March 4 agreement." Searching the record, however, we find no persuasive evidence that this exemption was anything more than an *ad hoc* decision made to avoid the union's responsibilities in this particular dispute. Moreover, we find nothing in the March 4th Agreement which would conflict with the unified procedure outlined in the UTU constitution.

represented by their bargaining agent, the Rock Island employees were already members of an international charged with representing their interests. Thus, not only are the Rock Island employees owed the substantive and procedural guarantees mandated by *Jones*—protections which were clearly not provided—but additional protection arising from their membership in the international union.

In addition, the UTU in the present case offended in more grievous ways affirmative duties of fair representation clearly imposed upon them. The March 4th Agreement and *Tucumcari* required the participation of the former Rock Island employees in the negotiation of the implementing agreements. Moreover, the appellants repeatedly requested participation. Finally, during the critical period of the transition, the UTU was actively closing down and consolidating its Rock Island union locals. This likely made it more difficult for the former Rock Island employees to understand and guard their rights and to determine whether their interests were being adequately protected by the CNW employees' representatives.

Essentially, however, we find that the October 22, 1980 implementing agreement was negotiated by representatives of a group with interests utterly hostile and adverse to those of the ground service employees, and was thus irrevocably flawed by unfair representation. The arbitrator then rendered a decision in which, without coherent or logical reasons, he deferred to the improperly negotiated agreement.

Under the Railway Labor Act, an arbitration can be vacated when the award exceeds the jurisdiction of the arbitrator. *See* 45 U.S.C. § 153(p). In the arbitration context, an award "without foundation in reason or fact" is equated with an award that "exceeds the authority or jurisdiction of the arbitrating body." *Brotherhood of Railroad Trainmen v. Central of Georgia Ry.*, 415 F.2d

403, 411-12 (5th Cir. 1969). The *Trainmen* court went on:

> To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract. This Court in *Safeway Stores v. American Bakery Workers Local 111*, 5th Cir. 1968, 390 F.2d 79, 81, 82, has recently announced the standard for review of an arbitrator's reward: " '[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.' * * * On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which there comes the 'common law of the shop'."

Id. at 412.

In deferring to the fundamentally flawed agreement, the arbitrator's decision was not in any way derived from the "wording or purpose of the collective bargaining agreement." Indeed, the purpose of the March 4th Agreement was to provide "a fair, equitable and *complete* arrangement for the *protection* of the Rock Island Employees." We hold this carefully delineated purpose could not be satisfied when the party negotiating for the ground service employees is the party with the single most adverse set of interests to appellants in the matter

of seniority. We thus find the arbitrator exceeded his jurisdiction under the Railway Labor Act.

We, therefore, remand these cases to the district court with directions to enter an order vacating the ground service employees' arbitration. We further direct the district court to order the parties to renegotiate an implementing agreement in line with the requirements set forth in the March 4th Agreement. In these negotiations, the representatives of the Rock Island employees will participate in an *active and significant manner*. We leave it to the International to determine whether representatives of the former Rock Island employees will be neceessary parties to the agreement, as its internal decision in *Tucumcari* strongly suggests, or whether they will be carefully consulted by the International prior to its negotiating the agreement.

Should the first course be chosen and the parties fail to reach a satisfactory agreement, the International shall represent both the CNW and former Rock Island employees in the arbitration that is to follow under the terms of the March 4th Agreement. Before the matter goes to arbitration, the International shall develop a unified position consistent with it constitution and internal decisions to assure adequate protection of the seniority interests of the former Rock Island employees. If the second course is chosen, the International shall similarly be directed by the district court to present a unified position consistent with its constitution and internal decisions. Again, should the parties fail to reach agreement, the International shall represent both the CNW and former Rock Island employees in line with a predetermined unified position.

C. The Non-Hire Appellants

1. Overview

The appellants in this category are former Rock Island employees who claim a right to be hired under the

March 4th Agreement and Section 105 of RITEA, 45 U.S.C. § 1004. As discussed above, the March 4th Agreement provides a right of first hire in terms of work arising out of the acquisition of former Rock Island trackage. RITEA provides a sweeping right of first hire to any former Rock Island employee who is not less qualified than other applicants for any position not covered by an affirmative action plan. These appellants allege that the CNW hired a great number of new workers who were not former Rock Island employees in violation of RITEA. Further, they allege that many of these new workers were hired to work on the former trackage of the Rock Island, thus violating the March 4th Agreement.

2. The Sunsetting Provision of 45 U.S.C. § 797(c)(f).

The arbitration provision which governs the appellants' claim is 45 U.S.C. § 797(c)(g). Subsection (f) of 45 U.S.C. § 797(c) states: "The provisions of this section shall cease to be effective on the expiration of the 6-year period beginning on August 13, 1981." Based upon this sunsetting provision, appellees argue that appellants have lost their right to arbitration. Appellants, on the other hand, contend that because the statutory subdivision containing the arbitration provision has lapsed, they now have a clear and unimpeded right to an action in federal court. The theories of both parties are incorrect.

3. Arbitration is Still Available to Appellants

Upon careful examination, it is clear that Congress did not intend to phase out arbitral redress for disputes involving preferential hiring under RITEA. When the evolving structure and purpose of 45 U.S.C. § 797(c) is carefully examined, it is apparent that the sunsetting provision of that section was intended to eliminate the Central Register of Railroad Employment administered by the Railroad Retirement Board (RRB) and not to cut off

the right to arbitration for disputes concerning preferential hiring.[13]

45 U.S.C. § 797, which corresponds to Title VII of the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (NRSA), was a part of the massive Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (OBRA) designed, at least at the outset, to drastically reduce the size and commitments of the federal government.

Title VII, part of the effort to privatize the failing Conrail, allowed the railroad to end onerous protective obligations that had been established by Title V of the Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1973). Specifically, Title VII allowed the railroad to terminate some employees or employee benefits in exchange for specified cash payments.

Part of the transition that was accomplished by Title VII involved the creation of a central register of displaced railroad employees. The register was to be of limited duration and was designed to assist employees in securing their preferential hiring rights. *See* NRSA § 704, 45 U.S.C. § 797(c). As originally introduced in Congress, § 797(c) contained only the provisions found in subsections now codified (a) through (f). *See* H.R. 3488, 97th Cong., 1st Sess. § 303 (introduced May 5, 1981); S. 1377, 97th Cong., 1st Sess. §§ 413-4 (introduced June 7, 1981). Subsections (a) through (e) required the RRB to maintain a central register of displaced railroad employees to facilitate their reemployment and to assist in the implementation of preferential hiring rights. Subsection (f) was the sunset provision which

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[13] Moreover, even had Congress intended to eliminate arbitration for disputes concerning preferential hiring, it might well be considered fundamentally unfair to withdraw the arbitral remedy from those claims already pending in federal court on August 13, 1987. *Cf. Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977).

allowed the RRB to end the registration apparatus within a reasonable time after the employee terminations allowed by NRSA.

It is important to note that subsection (g) of § 797(c), the arbitration provision at the heart of the present controversy, was not a coherent part of the legislative scheme of the original § 797(c), but only a last minute afterthought added later in conference. *See* H.R. Conf. Rep. No. 97-208, Book 1, 1st Sess., 329-30 (1981). It must be remembered that OBRA itself has long been noted for the vast legislative confusion engendered and the significant number of drafting oversights and errors that occurred as it wended its way through the Congress. Given this background, it is likely that any implication that Congress intended the right to arbitration for preferential hiring to end with this sunsetting provision was inadvertent.

This likelihood of inadvertency becomes a certainty when one examines the internal structure of Title VII. Title VII addresses a broad range of issues affected by the NRSA.[14] With only a few exceptions, it subjects disputes concerning these various topics to resolution under section 714, 45 U.S.C. § 797(m), which provides for arbitration by an adjustment board under section 3 of the Railway Labor Act, 45 U.S.C. § 153. Section 714 has no sunset provision.

The right to preferential hire was one of the few exceptions to arbitration under section 797(m), largely

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[14] *E.g.*, negotiation of protection agreements (§ 797); termination allowances (§ 797(a)); preferential hiring (§ 797(b)); maintenance of a central register of railroad employment (§ 797(c)); election and treatment of benefits (§ 797(d)); arrangement of work (§ 797(e)); contracting out (§ 797(f)); new collective bargaining agreements (§ 797(g)); employee and personal injury claims (§ 797(h)); limitation on liability (§ 797(i)); preemption (§ 797(h)); factfinding panels regarding certain collective bargaining issues (§ 797(i)); and arbitration of disputes (§ 797(m)).

because the right to preferential hire was initially related to the central register maintained by the RRB. The only substantive difference between section 797(c)(g), the arbitration provision at issue here, and section 797(m) is that the former subjects the right to arbitration to a preliminary screening by the RRB, the board charged with maintaining the central register. The substantive arbitration of both types of disputes is eventually accomplished by an adjustment board under 45 U.S.C. § 153. While the central register was in existence, it certainly made sense to subject preferential hiring claims to a preliminary screening by the RRB, which would be likely to have all the relevant information concerning these claims close at hand. Yet, the Congress could not have intended to cut off the right to arbitration completely to employees who had preferential hiring claims when the central register ceased to exist, particularly when arbitration was still available to those asserting grievances under almost all the other topic areas covered by Title VII.

We, therefore, find, as a matter of statutory interpretation, that the sunsetting provision of 45 U.S.C. § 797(c) only applies to the maintenance of the Central Register of Employees required under Title VII and that claims involving preferential hiring of former Rock Island employees with the CNW remain subject to arbitration by an adjustment board under section 3 of the Railway Labor Act, 45 U.S.C. § 153.

4. Conclusion

a. Specific Remedy to Non-Hire Appellants

Given the fact that the right to arbitration under 45 U.S.C. § 797(c)(g) still is open to appellants, we remand to the district court with directions to send the disputes under RITEA to be resolved by an adjustment board under section 3 of the Railway Labor Act. Moreover, the adjustment board should, at the same time,

consider appellants' claims arising under the March 4th Agreement.

b. Laches

Because neither RITEA nor the March 4th Agreement has any specific period of limitations, we leave to the arbitrator the question of whether the claims of the non-hire appellants are barred by laches.

In deciding this issue, the arbitrator is directed to take into account the following factors. First, the arbitrator should consider the delay in seeking redress caused by the closing of the Rock Island locals by various internationals. In this regard, the arbitrator should determine whether the former Rock Island employees were adequately informed of their rights under RITEA and the March 4th Agreement. Specifically, he should determine whether there were false assurances made by union representatives to the effect that Rock Island grievances would be redressed and the effect such assurances might have had in delaying action by the Rock Island employees.

Second, the arbitrator should take into account the cumulative effect of the serious unfair representation by the internationals in terms of the March 4th appellants. Not only did the unions act unfairly in the negotiation of the implementation agreement of the ground service employees, but they also did not properly represent the former Rock Island employees in the arbitration. This unfairness by the internationals to the March 4th appellants may have convinced the non-hire appellants that it would be futile to process their claims through conventional channels because they believed they could not rely on their union representatives to adequately represent their interests.

D. March 4th Engine Services Employees

The Newton engine service employees claim that the seniority they received under the implementing agree-

ments of February 22, 1982, was inadequate under the terms of the March 4th Agreement. The CNW answers that these employees were treated fairly.

We hold that the March 4th Engine Service plaintiffs have the right to have their claims submitted to a neutral arbitrator to determine whether their seniority rights were adequately protected under the terms of the February 16, 1982 implementing agreement. Appellants' claims are, however, subject to the defense of laches. In determining whether appellants' claims are barred by laches, the arbitrator should take into account all those factors listed in section IV(C)(4)(b) of this opinion.

E. The New-Hire Appellants

A fourth group of claimants are the new-hire appellants. These appellants were hired by the Rock Island after its acquisition by the CNW. They received no seniority and contend that their rights were violated under the March 4th Agreement. The CNW contends that the jobs the new hire appellants received did not arise out of the work related to the Rock Island acquisition, and thus they were not deserving of any seniority under the March 4th Agreement. Clearly, if the work did not arise directly from the Rock Island acquisition, the CNW is correct.

These new-hire appellants have the right to have their claims submitted to a neutral arbitrator to determine whether the jobs they received arose from the acquisition and, if they did, what seniority rights are due these appellants. Appellants' claims are, of course, subject to the defense of laches. In determining whether appellants' claims are barred by laches, the arbitrator should take into account all those factors listed in section IV(C)(4)(b) of this opinion.

V. CONCLUSION

This matter is remanded to the district court for action consistent with this opinion. Each party will bear its own costs on appeal. The mandate of this Court shall issue forthwith.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-641-D

VANE NEWTON, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 83-640-B

JOHN E. REECE, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-79-B

JACK L. CHAMBERS, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-80-B

ROGER SWIFT, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-81-B

HAROLD L. KING, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-82-B

ANGELINE V. BOLL, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-83-B

JAMES L. VAN DEE, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

RULINGS AND ORDERS

[Filed Feb. 19, 1986]

There are numerous motions in these related cases submitted after oral arguments on December 6, 1985. On April 18, 1984, this court ruled on several motions in *Reece* and *Newton*, and in a companion case, *Diltz v. Chicago and North Western Transportation Company, et al.*, Civil No. 83-642-B. The issues in the present set of motions are to a large extent controlled by the legal conclusions in those earlier rulings. Plaintiffs, who are represented by the same attorney, argue that this court should overrule its prior conclusions. The court is not inclined to do so, and the legal conclusions previously reached in *Reece*, *Newton*, and *Diltz* are reaffirmed.

All motions directed at claims based on section 105 of the Rock Island Act, 45 U.S.C. § 1004; claims based on section 122 of the Rock Island Act, 45 U.S.C. § 1017; and claims based on the March 4th, 1980, Agreement will be granted and those claims dismissed. *See Reece*, slip op. at 3-7 (April 16, 1985).

The court has considered the individual situation of each plaintiff against whom the statute of limitation defense is directed and finds that all claims arose more than six months before the filing of the complaints. All motions based on the applicable six month statute of limitations will be granted and the corresponding unfair representation claims dismissed.[1] *See Newton*, slip op. at 5-9 (April 16, 1985); *Engelhart v. Consolidated Rail Corp.*, 756 F.2d 1368 (2nd Cir. 1985); *United Independ-*

[1] At oral argument defendant Chicago and North Western Transportation Company (CNW) joined in defendant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees' statute of limitations motion as to plaintiff Stowe in the *Boll* case. Defendant CNW asserted their statute of limitations defense as to plaintiff Tollakson in *Boll* and plaintiff Van Dee in *Van Dee* in a motion for judgment on the pleadings. Normally a statute of limtations defense is raised by motion for summary judgment; however, the court will consider CNW's motion in connection with the motions for summary judgment submitted by other defendants as to these same plaintiffs.

ent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1262 (7th Cir. 1985); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984).

At oral argument plaintiffs' counsel acknowledged that as to the statute of limitations defense most of the plaintiffs in these cases are essentially in the same position as the plaintiffs in *Newton*. In resistance to the motions for summary judgment only plaintiffs Stowe and Tollakson in *Boll* rely on evidentiary material to dispute or supplement the undisputed facts as submitted by defendants. As with the other plaintiffs, the court has considered plaintiff Stowe's situation [2] and plaintiff Tollakson's situation [3] and determined that their claims are barred by the six months statute of limitations.

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[2] Plaintiff Stowe was informed of his seniority date change on August 19, 1982. His claim accrued at the latest after he received the June 10, 1983, letter. Plaintiff Stowe argues that the refusal to act contained in the October 4, 1983, letter should be the basis for determining the commencement of the statute of limitations period. This argument is rejected. The commencement of the statute of limitations cannot be delayed or restarted by a plaintiff sending letters to the union after the union has indicated that the matter has been concluded.

[3] Plaintiff Tollakson was not hired under the March 4, 1980, agreement but was hired as a temporary employee on April 3, 1980, and discharged on September 6, 1980. He continued to communicate with BRAC concerning employment with CNW during 1981. In late 1981 he telephoned BRAC and said that he was filing a complaint against CNW and BRAC with the Iowa Commission for Human Rights. At that time he was advised that BRAC could do nothing further for him. Plaintiff asserts by deposition that during phone conversations in 1981 he was led to believe that a formal claim would be filed, but that BRAC would never tell him of or send him any copies of any action being taken on his behalf. He also asserts in deposition that he thought a claim had been filed. Plaintiff does not dispute that he never specifically requested that BRAC file a claim on his behalf nor does plaintiff assert that BRAC ever specifically stated that a formal claim had been filed. No communication between BRAC and plaintiff Tollakon is asserted to

These rulings dispose of all claims in *Reece*, all claims by engine service employees in *Newton*, of claims in *Chambers*, all claims except the claims against defendant Brotherhood of Locomotive Engineers (BLE) in *Swift*, all claims in *King*, all claims except the claims by plaintiff Boll in *Boll*, and all claims in *Van Dee*.

BLE moves to dismiss the claims against it in *Swift*, claiming that the summons and complaint were not served. The sheriff's return expressly shows that service was not accomplished. Plaintiff argues that counsel for BLE appeared at a mandatory scheduling conference in the *Reece*, *Newton*, and *Diltz* cases and that this appearance and the actual knowledge of defendant BLE of the *Swift* lawsuit are adequate to create service. Assuming that the appearance of counsel for BLE at the scheduling conference for *Reece*, *Newton*, and *Diltz* could be construed as an appearance in *Swift*,[4] an appearance before an objection to service is made does not waive the objection. *Burroughs Corp. v. Carsan Leasing Co.*, 99 F.R.D. 528, 531 (D.N.J. 1983); *see also* Fed. R. Civ. P. 12 (h)(1) (stating when an objection to service of process is waived). Actual knowledge of a lawsuit by a defendant is not adequate to bar an objection to service of

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have occurred during 1982 or 1983 until plaintiff sent a letter to BRAC and BRAC responded with a letter dated September 27, 1983, stating in part, "in addition in the second paragraph of your letter you indicate that a position you had bid for in August 1980 or thereabout had been awarded to a junior employee. There is no record of a claim having been filed by you in that regard." Plaintiff Tollakson argues that, because he first discovered BRAC's failure to submit his claim when he received the September 27, 1983, letter, the date of that letter should serve as the commencement date for the statute of limitations. Plaintiff Tollakson does not claim that he made any effort between late 1981 until his letter in 1983 to investigate whether a claim had been filed. Plaintiff Tollakson's claim is barred by the six month statute of limitations.

[4] The Order on Scheduling referred to by plaintiff does state that it was to be filed in and have general application to *Swift*.

process. *Martin v. New York State Department of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir. 1978).

Plaintiffs in *Swift* claim that their complaint against BLE should not be dismissed for failure to serve within 120 days as required under Fed. R. Civ. P. 4(j) because they have shown "good cause" within the meaning of Rule 4(j). They ask the court to give them additional time to properly serve BLE. I believe that absent a showing of prejudice to defendants I should be liberal when determining whether good cause exists under Fed. R. Civ. P. 4(j). However, in view of the fact that the sheriff's return expressly shows that service was not made, I cannot find good cause, even under a liberal standard. Plaintiffs' complaint will be dismissed without prejudice as against defendant BLE.

BRAC moves to dismiss and for summary judgment as to the claims by plaintiff Boll in *Boll*, asserting that the allegations fail to establish facts showing a breach by defendant BRAC of its duty of fair representation and asserting that the dispute resolution procedure has not been exhausted. The allegations are adequate and plaintiff Boll had no duty to exhaust her claim against the union prior to bringing suit in federal court. *See Raus v. Brotherhood Railway Carmen of the United States and Canada*, 663 F.2d 791, 795-96 (8th Cir. 1981).

IT IS ORDERED that all defendants' motions as to the section 105 claims, section 122 claims, and claims based on the March 4th, 1980, agreement are granted.

IT IS FURTHER ORDERED that all defendants' motions based on the statute of limitations are granted.

IT IS FURTHER ORDERED that BLE's motion to dismiss the complaint in *Swift* for failure to properly serve is granted.

IT IS FURTHER ORDERED that BRAC's motions to dismiss and for summary judgment as to plaintiff Boll's claims in *Boll* are denied.

IT IS FURTHER ORDERED that the complaints in *Reece*, *Chambers*, *King*, *Swift*, and *Van Dee* are dismissed, except that the *Swift* complaint is dismissed without prejudice as to defendant BLE.

IT IS FURTHER ORDERED that the unfair representation claims by engine service employees in *Newton* are dismissed.

IT IS FURTHER ORDERED that all claims except the unfair representation claims of plaintiff Boll are dismissed from the *Boll* case.

DATED this 19th day of February, 1986.

/s/ Harold D. Vietor
HAROLD D. VIETOR
Chief Judge
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-641-D

VANE NEWTON, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 83-640-B

JOHN E. REECE, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-79-B

JACK L. CHAMBERS, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-80-B

ROGER SWIFT, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-81-B

HAROLD L. KING, *et al.*,
Plaintiffs,

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ANGELINE V. BOLL, *et al.*,
Plaintiffs,

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CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

Civil No. 84-83-B

JAMES L. VAN DEE, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Defendants.

JUDGMENT

[Filed Feb. 19, 1986]

IT IS ORDERED AND ADJUDGED that all defendants' motions as to the section 105 claims, section 122 claims, and claims based on the March 4th, 1980, agreement are hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that all defendants' motions based on the statute of limitations are hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that BLE's motion to dismiss the complaint in *Swift* for failure to properly serve is hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that BRAC's motions to dismiss and for summary judgment as to plaintiff Boll's claims in *Boll* are hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the complaints in *Reece*, *Chambers*, *King*, *Swift*, and *Van Dee* are hereby dismissed, except that the *Swift* complaint is dismissed without prejudice as to defendant BLE.

IT IS FURTHER ORDERED AND ADJUDGED that the unfair representation claims by engine service employees in *Newton* are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that all claims except the unfair representation claims of plaintiff Boll are hereby dismissed from the *Boll* case.

DATED this 19th day of February, 1986.

/s/ James R. Rosenbaum
JAMES R. ROSENBAUM
Clerk
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-641-D

VANE NEWTON, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

MEMORANDUM OPINION, RULINGS AND ORDER

[Filed Apr. 16, 1985]

There is before the court for ruling the motion of defendant Chicago and Northwestern Transportation Company (hereinafter CNW) for summary judgment, or, in the alternative, to dismiss.[1]

Plaintiffs are former ground service and engine service employees of the Chicago, Rock Island and Pacific Railroad Company (hereinafter Rock Island). CNW is the purchaser of certain segments of the Rock Island. Defendant United Transportation Union (hereinafter UTU) is the certified collective bargaining representative of CNW's ground service employees. Defendant Brotherhood of Locomotive Engineers (hereinafter BLE)

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[1] The motion was filed after CNW answered the complaint, so technically it is a motion for judgment on the pleadings rather than a motion to dismiss. Fed. R. Civ. P. 12(b) and (c).

is the certified collective bargaining representative of CNW's engine service employees when they are working as engineers. The United Transportation Union (Enginemen) (hereinafter UTU-E), a division of defendant UTU, is the certified collective bargaining representative of CNW's engine service employees when they are working as firemen or hostlers.

The complaint alleges violations of a contract entered into on March 4, 1980, violations of the Rock Island Railroad Transition and Employees' Assistance Act, 45 USC § 1001, et seq. (hereinafter Rock Island Act), and violations of the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 et seq.

BACKGROUND

The case has its origins in the bankruptcy of the Rock Island. In September, 1979, the Interstate Commerce Commission (hereinafter I.C.C.) concluded that the Rock Island had run out of cash making its continuing operation impossible in the face of national transportation requirements. The Rock Island ceased operations on September 21, 1979. Certain rail carriers were ordered pursuant to law to provide temporary service on the Rock Island Lines under the directed service provisions of the I.C.C. Act, 49 USC § 11125.

On March 4, 1980, thirteen railroads, including the CNW, and fifteen railroad unions, including the defendant unions, entered into an agreement known as the "March 4th Agreement," which recited, among other things, that its purpose was to provide a "fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner. . ."

The March 4th Agreement provides, among other things, that:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over . . . Rock Island . . . Lines.

The Agreement further provides:

> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island . . . the first right of hire respectively.

On March 18, 1980, the I.C.C. authorized CNW to operate on a portion of the lines of the Rock Island which had ceased operations. Later the CNW became "purchasing carrier" of certain railroad lines of the Rock Island as that term is defined in Article I, § 1(a) of the March 4th Agreement.

The Rock Island Act was signed into law by the President on May 30, 1980. Provisions which are relevant provide a first right of hire for Rock Island employees by other rail carriers, Section 105, 45 USC § 1004, and a requirement that the I.C.C., in allowing an operator to temporarily operate over any Rock Island Lines, must require that the operator use, to the maximum extent practicable, those former Rock Island employees who had provided service over those lines for the Rock Island, Section 122, 45 USC § 1017.

The plaintiffs are former ground service and engine service employees of the Rock Island. After the Rock Island ceased operations, the plaintiffs were hired by the CNW pursuant to the March 4th Agreement. Article II, § 9 of the agreement directs carriers that hire former Rock Island employees pursuant to its provisions to negotiate with employee representatives "concerning the manner in which seniority will be allocated" between employees of the carrier and the hired former Rock Is-

land employees "in filling additional job assignments." It further provides that if an agreement allocating seniority is not reached, the matter is subject to binding arbitration.

After plaintiffs were hired, negotiations took place between the CNW and the unions representing the plaintiffs in an effort to reach an agreement allocating seniority between the Rock Island employees hired by the CNW and the CNW's other employees. In the case of the ground service plaintiffs (conductors, trainmen, and switchmen), who were represented by the defendant UTU, an agreement acceptable to both the CNW employees' representatives and the former Rock Island employees' representatives was not reached. Accordingly, the UTU submitted the dispute over the seniority arrangements for the former Rock Island ground employees to binding arbitration pursuant to Article II, § 9(b) of the March 4th Agreement. The arbitrator, appointed by the National Mediation Board, issued his decision on May 20, 1983. In the case of the engine service plaintiffs (engineers, firemen, and hostlers), who were represented by the defendant BLE and by the UTU-E, implementing agreements allocating the former Rock Island employees' seniority were executed by the unions and the CNW on February 16, 1982.

PLAINTIFFS' CLAIMS

The ground service plaintiffs contend they should have received better seniority arrangements than were awarded by the federally appointed arbitrator. Similarly, the engine service plaintiffs contend that they should have received better seniority arrangements than were agreed to by their unions and the CNW. Both sets of plaintiffs assert that their unions breached their duty of fair representation and that if the unions had represented them fairly, they would have received better seniority arrangements. Plaintiffs seek damages from the

union defendants. In addition, plaintiffs assert that the CNW participated in this alleged unfair representation and, therefore, that it too should be liable for damages.[2]

ADEQUACY OF CLAIMS

The CNW moves to dismiss and for summary judgment contending that plaintiffs' allegations are inadequate to state claims of breach of duty of fair representation and that undisputed facts conclusively establish that plaintiffs cannot prove unfair representation by the unions or participation in any unfair representation by the CNW.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court articulated the test as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the

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[2] While paragraph 18 of the complaint alleges that the CNW breached the March 4th Agreement by not "recogniz[ing] their previous seniority standing," plaintiffs have apparently dropped this claim. [See Pl. Br. 7, 9.] In any event, the March 4th Agreement does not require seniority to be allocated in any particular manner. Accordingly, plaintiffs have not stated a claim against the CNW for breach of the March 4th Agreement.

Plaintiffs also assert that the CNW violated section 122 of the Rock Island Act, 45 U.S.C. § 1017, by not recognizing their Rock Island seniority during the period it was operating under temporary I.C.C. authority. This allegation fails to state a claim against the CNW both because section 122 says nothing about seniority and because section 122 is not enforceable by a private right of action. *Reece v. Chicago and Northwestern Transportation Company*, Civil No. 83-640-B, (S.D. Ia.) Ruling, April 16, 1985.

> claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236.

Summary judgment should not be granted unless the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The drastic nature of the summary judgment places a burden on the defendant to establish, with such clarity as to leave no room for controversy, that the plaintiffs are not entitled to recover under any circumstances. *Champale, Inc. v. Joseph S. Pickett & Sons, Inc.*, 599 F.2d 857, 859 (8th Cir. 1979). The evidence must be viewed in the light most favorable to the party opposing the motion. *Id.*

Although the record presented may lead one to think it unlikely that either the ground service plaintiffs or the engine service plaintiffs will ultimately prevail against the CNW on their unfair representation claims, this court cannot conclude that the record establishes with such clarity as to leave no room for controversy that plaintiffs are not entitled to recover under any circumstances.

STATUTE OF LIMITATIONS

The CNW also moves for summary judgment in respect to the claims of the engine service plaintiffs on the ground that their claims are barred by the applicable statute of limitations.

The limitations period that governs plaintiffs' claims is six months. Section 10(b), National Labor Relations Act, 29 U.S.C. § 160(b) (1973). The Supreme Court determined this to be the appropriate limitations period for unfair representation claims under the National Labor Relations Act in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and the United States Court of Appeals for this Circuit has held that this six-month limitations period is to be applied retroactively, *Lincoln v. District 9*, 723 F.2d 627, 630 (8th Cir. 1983), and it applies to unfair representation claims, like plaintiffs', that are brought under the Railway Labor Act. *Hunt v. Missouri Pacific Railroad Co.*, 729 F.2d 579, 581 (8th Cir. 1984). Accordingly, since the complaint in this case was filed on November 18, 1983, plaintiffs' claims are barred if their cause of action accrued more than six months earlier—*i.e.*, prior to May 18, 1983.

The question of when an unfair representation cause of action accrues is a matter of federal law. See *Gatlin v. Missouri Pacific Railroad Co.*, 631 F.2d 551, 554 (8th Cir. 1980); *Butler v. Local Union 823, International Brotherhood of Teamsters*, 514 F.2d 442, 448-49 (8th Cir. 1974), *cert. denied*, 423 U.S. 924 (1975). Under federal law, plaintiffs' claim accrued on February 16, 1982, 21 months before this suit was filed. This is because (a) the injury about which plaintiffs complain—the allegedly disadvantageous allocation of seniority—became "fixed and reasonably certain" at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. See *Hafer v. Air Line Pilots Association*, 525 F. Supp. 874, 877 (D. Hawaii 1981), *aff'd*, 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association*, 609 F.2d 934 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980).

Plaintiffs seek to avoid the bar of limitations by asserting that the so-called "discovery rule" applies and that they did not discover the existence of their cause of action until after May 18, 1983, because "they have only recently discovered the wrongful acts of the Defendant Unions and . . . much of the wrongful conduct has only been discovered within 6 months of the filing of this litigation." [Pl. Br. 56.] Specifically, they assert that they discovered only recently that (a) the February 16, 1982 agreements "were apparently not ratified or executed in accordance with" the unions' constitutions, (b) the defendants acted to exclude appropriate Rock Island representatives from the implementing agreement negotiations and otherwise failed to follow procedures prescribed by the unions' constitutions, and (c) plaintiffs' locals were wrongfully closed. [Pl. Br. 56-57]. The court holds that even if the discovery rule applies to plaintiffs' challenge to the February 16, 1982 implementing agreements, their cause of action nevertheless accrued prior to May 18, 1983.

It is the knowledge of injury and its immediate cause that starts the running of a limitations period under the discovery rule, not the knowledge of whether that injury is legally actionable. E.g., *United States v. Kubrick*, 444 U.S. 111 (1979); *Dyniewicz v. United States*, 742 F.2d 484, 486-87 (9th Cir. 1984). Thus, a cause of action challenging a seniority agreement accrues under the discovery rule when the plaintiffs know or should have discovered the terms of the agreement. *Benson v. General Motors Corp.*, 716 F.2d 862, 864 (11th Cir. 1983). See also *Farr v. H. K. Porter Co.*, 747 F.2d 502, 505-06 (5th Cir. 1984). Plaintiffs do not contend that they failed to discover the existence of the February 16, 1982 agreements and their effect on plaintiffs' seniority during the 15 months between the signing of those agreements and May 18, 1983. Their challenge to the February 16, 1982 agreements is therefore time-barred regardless of when

they discovered the particular facts upon which they base their unfair representation claim.

Moreover, plaintiffs' unfair representation claim is time-barred even under their interpretation of the discovery rule. For plaintiffs' claim to be timely under their own theory, they would have to show not merely that they did not discover the particular wrongful union acts until after May 18, 1983; they would have to show also that they exercised due diligence within the six months after they learned about the seniority arrangements established by the February 16, 1982 agreements. Plaintiffs have failed to make such a showing. None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983.

Alternatively, plaintiffs seek to avoid the bar of limitations by asserting that the running of the limitations period was postponed until after May 18, 1983 because of "fraudulent concealment" by the union. The court finds that plaintiffs have failed to show that this tolling doctrine applies to their claims for three reasons.

First, as with the "discovery rule," a plaintiff is entitled to the benefit of the "fraudulent concealment" doctrine only if he demonstrates that during the limitations period he exercised due diligence to discover the existence of his cause of action and that, despite this due diligence, he failed to discover the cause of action within the limitations period. See, *e.g.*, *Campbell v. The Upjohn Co.*, 676 F.2d 1122, 1126-27 (6th Cir. 1982). Plaintiffs' affidavits fail to demonstrate the exercise of due diligence prior to May 18, 1983.

Second, even a plaintiff who has exercised "due diligence" can benefit from the "fraudulent concealment" doctrine only if during the limitations period the defendant has wrongfully concealed from the plaintiff facts underlying the plaintiff's cause of action. See, *e.g.*, *Campbell v. The Upjohn Co.*, *supra*, 676 F.2d at 1126. Neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW. Silence or passive conduct is not sufficient to toll the running of the limitations period. See *Dyniewicz v. United States*, *supra*, 742 F.2d at 487; *Woollett v. Bankers Life Co.*, 572 F. Supp. 650, 658 (E.D. Mich. 1983).

Third, plaintiffs have not alleged any concealment, active or passive, by the CNW. Accordingly, even if the statute could be tolled as to plaintiffs' claims against the unions, plaintiffs have failed to demonstrate that it should be tolled as to their claims against the CNW.

RULINGS AND ORDER

The CNW's motion for summary judgment is denied as to the ground service plaintiffs and is sustained, only on the statute of limitations ground, as to the engine service plaintiffs.

The CNW's alternative motion to dismiss is denied.

It is ordered that plaintiffs' counsel shall promptly certify to the clerk of this court the names of the engine service plaintiffs and the clerk shall then enter judgment of dismissal in favor of defendant CNW and against those engine service plaintiffs.

DATED this 16th day of April, 1985.

/s/ Harold D. Vietor
HAROLD D. VIETOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-640-B

JOHN E. REECE, *et al.*,
Plaintiffs,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Defendants.

MEMORANDUM OPINION, RULING AND ORDER

[Filed Apr. 16, 1985]

There is before the court for ruling the motion of defendant Chicago and Northwestern Transportation Company (hereinafter CNW) to dismiss[1] or, in the alternative, for summary judgment.

Plaintiffs are former employees of the Chicago, Rock Island and Pacific Railroad Company (hereinafter Rock Island). CNW is the purchaser of certain segments of the Rock Island. Defendant United Transportation Union (hereinafter UTU) is the certified collective bargaining representative of CNW's ground service employees. Defendant Brotherhood of Locomotive Engineers (hereinafter BLE) is the certified collective bargaining repre-

[1] The motion was filed after CNW answered the complaint, so technically it is a motion for judgment on the pleadings rather than a motion to dismiss. Fed. R. Civ. P. 12(b) and (c).

sentative of CNW's engine service employees when they are working as engineers. The United Transportation Union (Enginemen) (hereinafter UTU-E), a division of defendant UTU, is the certified collective bargaining representative of CNW's engine service employees when they are working as firemen or hostlers.

The complaint alleges violations of a contract entered into on March 4, 1980, violations of the Rock Island Railroad Transition and Employees' Assistance Act, 45 USC § 1001, et seq. (hereinafter Rock Island Act), and violations of the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 et seq.

BACKGROUND

The case has its origins in the bankruptcy of the Rock Island. In September, 1979, the Interstate Commerce Commission (hereinafter I.C.C.) concluded that the Rock Island had run out of cash making its continuing operation impossible in the face of national transportation requirements. The Rock Island ceased operations on September 21, 1979. Certain rail carriers were ordered pursuant to law to provide temporary service on the Rock Island Lines under the directed service provisions of the I.C.C. Act, 49 USC § 11125.

On March 4, 1980, thirteen railroads, including the CNW, and fifteen railroad unions, including the defendant unions, entered into an agreement known as the "March 4th Agreement," which recited, among other things, that its purpose was to provide a "fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner."

The March 4th Agreement provides, among other things, that:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over . . . Rock Island . . . Lines.

The Agreement further provides:

> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island . . . the first right of hire respectively.

On March 18, 1980, the I.C.C. authorized CNW to operate on a portion of the lines of the Rock Island which had ceased operations. Later the CNW became "purchasing carrier" of certain railroad lines of the Rock Island as that term is defined in Article I, § 1(a) of the March 4th Agreement.

The Rock Island Act was signed into law by the President on May 30, 1980. Provisions which are relevant provide a first right of hire for Rock Island employees by other rail carriers, Section 105, 45 USC § 1004, and a requirement that the I.C.C., in allowing an operator to temporarily operate over any Rock Island Lines, must require that the operator use, to the maximum extent practicable, those former Rock Island employees who had provided service over those lines for the Rock Island, Section 122, 45 USC § 1017.

Plaintiffs formerly worked for the Rock Island on lines acquired by CNW as purchasing carrier. They were not hired by CNW.

PLAINTIFFS' SECTION 105 CLAIMS

Plaintiffs assert claims under section 105 of the Rock Island Act, 45 USC § 1004. The CNW contends that 45 USC § 797c(g) gives administrative tribunals exclusive jurisdiction over such claims and therefore deprives the court of subject matter jurisdiction over plaintiffs' section 105 claims.

Plaintiffs do not dispute that 45 USC § 797c(g) applies to their section 105 claims. That statute expressly provides that "[a]ny dispute, grievance, or claim arising under" section 105 of the Rock Island Act (as well as two other preferential hiring statutes) "shall be subject to resolution in accordance with" a prescribed two-step dispute resolution process. The first step prescribed is for a claimant to petition the Railroad Retirement Board to investigate his claim [45 USC § 797c(g)(1)]; the second step, if the Retirement Board determines that section 105 "may have been violated," is for the claimant to submit his claim to an adjustment board established under the Railway Labor Act [45 U.S.C. § 797c(g)(2)]. The sole issue for the court, therefore, is whether these prescribed procedures are mandatory, as the CNW contends, or permissive, as plaintiffs contend.

In *Brotherhood of Locomotive Engineers v. Burlington Northern, Inc.*, 580 F. Supp. 797 (D. Colo. 1984), the court held that 45 USC § 797c(g) requires the dismissal of preferential hiring claims for lack of subject matter jurisdiction. This court agrees. The dispute resolution procedures prescribed by 45 U.S.C. § 797c(g) are mandatory. The key language of that statute—"shall be subject to resolution in accordance with"—is unambiguous and plainly mandatory. This language cannot reasonably be interpreted to give claimants a choice between following the prescribed administrative procedures or coming to court. Accordingly, the plaintiffs' section 105 claims must be dismissed.

PLAINTIFFS' SECTION 122 CLAIMS

The second statutory claim asserted by plaintiffs is based on section 122 of the Rock Island Act, 45 U.S.C. § 1017. The CNW contends that this statute creates no private right of action and, therefore, that plaintiffs have not stated a claim against the CNW based on this statute. The CNW also contends that even if plaintiffs

could assert a damage claim against it for an alleged violation of section 122, such a claim, like plaintiffs' section 105 claim, would be subject to the exclusive jurisdiction of administrative tribunals and therefore would be outside this court's subject matter jurisdiction.

Section 122 is not a directive or prohibition addressed to any private party. It merely directs the I.C.C., in authorizing carriers to conduct temporary operations over former Rock Island lines, to "require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission." It neither expressly grants nor denies a private cause of action, and, therefore, the "ultimate issue . . . is whether Congress intended to authorize the implied cause of action asserted in this case." *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 821 (S.D. Ia. 1982).

In ascertaining congressional intent, courts first look to the language of the statute. Section 122 does not speak in terms of "rights" provided to former Rock Island employees. It thus stands in sharp contrast to section 105 of the same statute, which expressly provides former Rock Island employees with a "first *right* of hire." Nor does section 122 direct private parties, such as the CNW, to act in a particular way. Rather, it is phrased as a directive to the I.C.C. As the Supreme Court held in *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754 (1981), such a "command to a federal agency" provides "no support for the implication of a private remedy." *Id.* at 772-73.

Courts next look to the legislative history of the statute to see if it contains an indication that Congress intended the statute to be enforceable by a private right of action. Plaintiffs identify no legislative history supporting a private right of action in this case. At most, therefore, the legislative history of the Rock Island Act is silent on the question of private enforcement of section 122.

Under these circumstances, it is clear that section 122 is not enforceable by a private right of action. As the Supreme Court stated in *Touche Ross & Co. v. Redington, Trustee*, 442 U.S. 560, 571 (1979), "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." In that case, like this one, the statute "by its terms grant[ed] no private rights to any identifiable class and proscribe[d] no conduct as unlawful," and the legislative history "simply [did] not speak to the issue of private remedies." *Id.* at 576.

The court concludes that section 122 does not create a private right of action, and plaintiffs' claims under that statute must be dismissed.[2]

The foregoing being dispositive of plaintiffs' section 122 claims, the court does not address CNW's alternative contention that exclusive jurisdiction rests with administrative tribunals.

PLAINTIFFS' CONTRACT CLAIMS

Plaintiffs contend that the March 4th Agreement gave them a right to be hired by the CNW and the CNW breached that agreement by not hiring them. Plaintiffs assert that the CNW did not comply with sections 2 and 3 of Article II of the agreement, which require railroads purchasing Rock Island lines to hire former Rock Island employees in seniority order to fill the "necessary additional manpower requirements" determined by the purchasing railroad to be "due to its taking over those Rock Island . . . Lines." The CNW contends that this breach

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[2] Plaintiffs also contend that 28 USC § 1336 gives them the right to sue for damages for alleged violations of I.C.C. orders issued pursuant to section 122. Section 1336 of Title 28 is merely a jurisdictional statute: it permits the federal courts to exercise subject matter jurisdiction over causes of action authorized by other statutes but does not itself authorize a private right of action for damages.

of contract claim is subject to the exclusive jurisdiction of adjustment boards under the Railway Labor Act, and that the court should dismiss this claim for lack of subject matter jurisdiction.

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i), vests adjustment boards with exclusive jurisdiction over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Courts therefore have no subject matter jurisdiction over such disputes. See *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Landfried v. Terminal Railroad Association of St. Louis*, 721 F.2d 254, 255 (8th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3720 (1984).

The March 4th Agreement deals with such matters as seniority, compensation guarantees, and discharge. It therefore concerns "rates of pay, rules, [and] working conditions." This is clear not only from the coverage of the agreement itself, but also from the decisions of the United States Court of Appeals for this circuit with respect to agreements concerning such matters in *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) and in *United Transportation Union-E v. Burlington Northern, Inc.*, 470 F.2d 813 (8th Cir. 1972). The Eighth Circuit determined in both of these cases that adjustment boards had jurisdiction over disputes concerning labor protective agreements which, like the March 4th Agreement, established the terms pursuant to which railroads' work forces would be consolidated.

Plaintiffs' contract claim turns on the "interpretation or application" of the March 4th Agreement, and therefore it is the type of dispute that the Railway Labor Act subjects to the exclusive jurisdiction of adjustment

boards. Accordingly, plaintiffs' contract claim will be dismissed for lack of subject matter jurisdiction.[3]

PLAINTIFFS' UNFAIR REPRESENTATION CLAIM

Plaintiffs' final claim is that their unions breached their duty of fair representation by failing to enforce their alleged rights under the Rock Island Act and the March 4th Agreement, and that the CNW conspired or participated in the breach by negotiating with the defendant unions in bad faith. The CNW moves to dismiss this claim for failure to state a claim against it.

To state a claim for unfair representation against an employer, a plaintiff first must plead "good faith allegations and facts supporting those allegations indicating collusion or otherwise tying the railroad and the union together" in "denying the employee [his] rights under the contract and the Railway Labor Act." *Raus v. Brotherhood of Railway Carmen*, 663 F.2d 791, 798 (8th Cir. 1981).

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Scheuer v. Rhodes*, 416 U.S.

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[3] Plaintiffs contend that section 3 First (i) is not applicable to their claims because they are not CNW employees. Section 3 First (i) applies to disputes between any railroad "employee" and a "carrier or carriers." Section 1 Fifth of the Act, 45 U.S.C. § 151 Fifth, defines "employee" as "every person in the service of a carrier." Because plaintiffs remain Rock Island employees for purposes of the March 4th Agreement [Art. II, § 7, Pl. Br. 51], they are "employees" within the meaning of the Railway Labor Act, including section 3 First (i). Their claims against the CNW are therefore subject to the jurisdiction of adjustment boards even though they are not CNW employees. *See Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, 499 F. Supp. 967 (E.D. Pa. 1980) (dispute between D&H Employee and Conrail held subject to adjustment board jurisdiction).

232 (1974), the Supreme Court articulated the test as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236.

I believe that plaintiffs' unfair representation claim against the CNW is pleaded sufficiently to withstand the CNW's motion to dismiss.

RULING AND ORDER

The CNW's motion is granted as to the section 105 claims, the section 122 claims, and the contract claims, and it is ordered that those claims be dismissed.

The CNW's motion is denied as to the unfair representation claims.

DATED this 16th day of April, 1985.

/s/ Harold D. Vietor
HAROLD D. VIETOR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-1369,

L. LEE BEARDSLY,
Appellant,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

FRANCIS E. AMIOT,
Appellant,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

No. 86-1370

JOHN E. REECE, *et al.*,
Appellants,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

No. 86-1372

JACK L. CHAMBERS, *et al.*,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Appellees.

No. 86-1373

ROGER L. SWIFT; OSCAR D. OVERTON; W. R. URTON; ROBERT W. LUTH; MARK R. POMERY; DAVID G. DICKEY; TERRY B. TURVOLD and CLYDE R. THOMAS,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY; UNITED TRANSPORTATION UNION, an unincorporated labor organization; and THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization,
Appellees.

No. 86-1374

HAROLD L. KING; JAMES L. KNOX; STEVEN ARTHUR NEWTON; GEORGE R. ETHERTON; LARRY L. WILLIAMS; JOHN F. KEITH; and JOSEPH A. RUSH,
Appellants,
v.
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY and THE UNITED TRANSPORTATION UNION, an unincorporated labor organization,
Appellees.

No. 86-1950

VANE NEWTON; ROBERT R. BAILEY; WAYNE A. MOORE; ROBERT L. DUNCAN; HAROLD E. JOHNSON; DONALD L. KIDD, SR.; H. L. KIDD, JR.; B. J. RUDE; MAX A. EADS; JACK E. BROWN; MILTON E. CAPPS; WILBUR STANTON; J. W. BURKE, JR.; E. D. SNYDER; DANIEL V. MIDDOUR; DONALD P. MCCALEB; SAM H. DEAN; DONALD E. BISGAARD; ROBERT W. SHANER; LADON E. CRANE; ROGER L. ROTHAMEL; ARNOLD M. SCHEEL; FRANK M. RAMEY; A. M. MCQUADE; LLOYD G. ANDREWS; RICHARD D. THORSLAND; JOHN R. VINCENT; STEPHEN R. EARLY; LEO T. SEEHAN; and RICHARD A. NITCHER; JOHN E. BEGHTOL; DENNIS E. CHAPLIN; PAUL W. STRAWN; MAX R. WILLIAMS; DAVID YACKLE; FRANCIS E. AMIOT; JAMES F. RAMSEY; ALLAN P. SHERLING; JERRY E. PAYNE; RICHARD A. CLARK; KENNETH W. BREVIG; STEPHEN D. ROSENTANGLE and WILLIAM H. ROSENTANGLE, *Appellants*,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY; UNITED TRANSPORTATION UNION, an unincorporated labor organization; and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization, *Appellees.*

No. 87-1325

ANGELINE V. BOLL,
ROBERT J. TOLLAKSON and DENNIS L. STOWE,
v. *Appellants*,

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated labor organization, *Appellees.*

Appeal from the United States District Court
for the Southern District of Iowa

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed insofar as it dismissed several of the actions for lack of jurisdiction but the judgment of the district court is reversed on the denial of appellants' request to vacate an arbitration decision between the CNW and the United Transportation Union (UTU) regarding former Rock Island ground service employees. It is further adjudged and decreed that the terms of the October 22, 1980 seniority implementing agreement as affirmed by the arbitrator are invalid. The terms of that agreement shall be renegotiated. The Court further decrees that the remaining employees have a right to arbitration subject to the right of the CNW and the appellee unions to assist [sic] the defense of laches.

The matter is remanded to the district court for action consistent with this opinion. Each party will bear its own costs on appeal. The mandate of this Court shall issue forthwith.

June 15, 1988

A true copy.

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1369/70/72/73/74/
86-1950 and 87-1325SI

L. LEE BEARDSLEY, *et al.*,
Appellants,

vs.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,
Appellees.

Appeals from the United States District Court
for the Southern District of Iowa

Appellees' petitions for rehearing en banc have been considered by the Court and are denied. Judge C. Arlen Beam recused himself and did not participate in the voting.

June 20, 1988

Order entered at the Direction of the Court:

/s/ [Illegible], Chief Deputy
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1369/70/72/73/74/
86-1950 and 87-1325SI

L. LEE BEARDSLY,

Appellant,

vs.

CHICAGO & NORTH WESTERN TRANSPORTATION CO., *et al.*,

Appellees.

Appeals from the United States District Court
for the Southern District of Iowa

Appellees' petitions for rehearing en banc have been considered by the Court and are denied.

Hon. C. Arlen Beam recused himself.

Petitions for rehearing by the panel are also denied.

September 14, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

TEXT OF STATUTES INVOLVED

Section 3 of the Railway Labor Act, 45 U.S.C. § 153, provides in pertinent part:

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 151a and 152 of this title.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

Section 105 of the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. § 1004, provides:

§ 1004. Railroad hiring

(a) Each person who is an employee of the Rock Island Railroad on August 1, 1979, and who, prior to January 1, 1984, is separated or furloughed (other than for cause) from his employment with such railroad, or from his employment with another rail carrier providing temporary service over lines of the Rock Island Railroad, as a result of a reduction of service by such railroad or such temporary service carrier shall, unless found to be less qualified than other applicants, have the first right of hire by any other rail carrier that is subject to regulation by the Commission for any vacancy that is not covered by (1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulations, or Executive order, or by the order of a Federal or State court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this section, a rail carrier shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.

(b) The rights afforded to Rock Island Railroad employees by this section shall be coequal to the rights afforded to Chicago, Milwaukee, Saint Paul and Pacific Railroad Company employees by section 907 of this title.

Section 704(g) of the Regional Rail Reorganization Act, as amended, 45 U.S.C. § 797c(g), provides:

§ 797c. Central register of railroad employment

* * * *

(g) Resolution of disputes

Any dispute, grievance, or claim arising under this section, section 797b of this title, section 907 of this title, or section 1004 of this title shall be subject to resolution in accordance with the following procedures:

(1) Any employee with such a dispute, grievance, or claim may petition the Board to review and investigate the dispute, grievance, or claim.

(2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under this section, section 797b of this title, section 907 of this title, or section 1004 of this title may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(3) In the case of any violation of this section, section 797b of this title, section 907 of this title, or section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

Section 10 of the National Labor Relations Act, 29 U.S.C. § 160, provides in pertinent part:

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.

* * * *

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

* * * *

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No. 88-994

In The

Supreme Court of the United States

October Term, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

L. LEE BEARDSLY, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by declaring that the individual respondents had the right to have their claims submitted to arbitration, subject to the defense of laches.

2. Whether the Court of Appeals properly determined that an arbitrator, rather than a court, should decide whether an arbitration proceeding is subject to the defense of laches.

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No. 88-994

In The

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October Term, 1988

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

L. LEE BEARDSLY, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, former employees of the Chicago, Rock Island & Pacific Railroad Company ("Rock Island"), respectfully requests that this Court deny the petition for writ of certiorari filed by petitioner, Chicago & North Western Transportation Company ("CNW"), seeking review of the Court of Appeals for the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 850 F.2d 1255 (Pet. App. 1a-44a). That opinion was issued upon a request for rehearing and

superseded the court's earlier opinion which was reported at 836 F.2d 1493. The opinions, rulings, orders, and judgment of the United States District Court for the Southern District of Iowa which form the basis for the Court of Appeal's opinion are all unreported (Pet. App. 45a-73a).

JURISDICTION

The decision of the Court of Appeals upon rehearing was issued on June 15, 1988. Petitioner's petition for rehearing and suggestion for hearing en banc was denied on September 14, 1988 (Pet. App. 92a). Petitioner filed its petition for a writ of certiorari on December 13, 1988. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3 First of the Railway Labor Act, 45 U.S.C. § 153 First; § 105 of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1004; § 704(g) of the Regional Rail Reorganization Act, 45 U.S.C. § 797c(g); and § 10 of the National Labor Relations Act, 29 U.S.C. § 160(b), are set forth in pertinent part at Pet. App. 80a-84a.

STATEMENT OF THE CASE

1. In late 1983 and early 1984, the individual respondents[1] filed a number of lawsuits against CNW, the United Transportation Union ("UTU"), the Brotherhood of Locomotive Engineers ("BLE"), and two other unions. The complaint in those cases alleged that the defendants violated a contract entered into between numerous parties on March 4, 1980 ("March 4th Agreement"), provisions of the Rock Island Railroad Transition and Employees' Assistance Act ("RITEA"), 45 U.S.C. § 1001 *et seq.*, and the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The complaints requested substantive relief in the form of damages against all defendants, including petitioner. The complaint also requested that the respondents be given seniority with CNW which dovetailed with the seniority of other CNW employees.

In response to the complaint, the defendants raised several arguments. They argued that the individual respondents failed to exhaust the "administrative remedies" provided by the RITEA and the March 4th Agreement. They also argued that, based on the reasoning of this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), a six month statute of limitations prevented the district court from hearing the case.

The defendants filed summary judgment motions arguing, in part, that the claims in the complaint

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[1] The respondents who were former Rock Island employees shall be referred to as the "individual respondents". The other respondents shall be referred to by name or as the "unions".

fell outside the six month limitations that should be applied to the case, and hence the district court did not have jurisdiction to hear the case. They also argued that the RITEA did not give the district court jurisdiction over the case and that the individual respondents' claims were barred because they had not sought arbitration.

The respondents argued that a two year statute of limitations based upon a similar two year limitation period contained in Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), should be used rather than a six month period. The respondents also argued that the statute of limitations did not start running until some time after June 20, 1983 – the date the bankruptcy court issued final approval of the sale of the Rock Island assets to CNW. They argued that the earlier implementing agreements were merely interim and not final until the transfer was approved, since there was uncertainty regarding which railroad would finally control the railroad lines formerly operated by Rock Island. They further argued that the facts contained in the affidavits of the individual respondents indicated that, in any event, a question of fact existed as to whether the statute of limitations should be tolled because of certain inequitable conduct by the defendants. The individual respondents also argued that the court had jurisdiction under the RITEA to hear their cases, even though they had not sought arbitration.

The district court granted the defendants' summary judgment motions. The individual respondents then appealed to the Eighth Circuit, where their cases were consolidated.

2. On appeal to the Eighth Circuit, the defendants argued that the district court's decision should be affirmed because the applicable six month statute of limitation deprived that court of jurisdiction (Pet. App. 25a). In particular, they argued that the same reasoning which supported a six month statute of limitations in *DelCostello*, should be followed, so that no action which accrued prior to May 18, 1983, could be brought in federal court. They further argued that the statute of limitations should have started running with a signing of the implementing agreements between the CNW and the various unions setting hiring conditions and allocating seniority between former Rock Island employees and incumbent CNW employees.

The respondents again argued that the appropriate statute of limitations to apply to cases under the Railroad Labor Act is the two year period specified in 45 U.S.C. § 153 First (r). The respondents argued that the two year period specified in that section more accurately reflected a congressional determination regarding the appropriate time limit for resolving employment disputes in the railroad context. The respondents again argued the statute of limitations did not begin to run until some time after June 20, 1983, when the CNW purchase was finalized.

The parties disagreed about whether the respondents had any right to arbitration under RITEA (Pet. App. 38a). CNW and the unions argued that the statutory arbitration provision in 45 U.S.C. § 797c(g) no longer applied because of the sunset provision in 45 U.S.C. § 797c(f) (Pet. App. 38a). The individual respondents, on the other hand, argued that the lack of an arbitration provision strengthened their argument that they could bring an independent federal action.

The Eighth Circuit held that the respondents could not bring, at this time, an independent cause of action for money damages under the March 4th Agreement or under the RITEA (Pet. App. 21a-25a). The court also held that the respondents' unfair representation claims against the unions were barred by the running of a six month statute of limitations (Pet. App. 25a). The Court, however, went on to resolve other controversies which existed between the parties by declaring the rights which each party had under the March 4th Agreement and the RITEA.

In particular, the court's opinion resolved a controversy between the individual respondents and the other parties regarding the availability of arbitration and the need for the individual respondents to have used arbitration prior to the filing of the lawsuit. The court determined that the sunset provision of 45 U.S.C. § 797c(f) was not meant to remove the claims of the individual respondents under the RITEA from the arbitration procedures established by § 797c(g). As to arbitration of the March 4th Agreement, the court held that the respondents had the right to have a neutral arbitrator determine whether their rights were adequately protected under the terms of the various implementing agreements between CNW and the unions (Pet. App. 41a-43a).

The court noted, however, that an arbitrator would have to determine whether the respondents' claims under the March 4th Agreement and RITEA were barred by the equitable doctrine of laches. The court described some, but not all, of the factors that an arbitrator should take into account in making a laches determination (Pet. App. 42a-43a).

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because the action taken by the Eighth Circuit does not conflict with the decisions of this Court or any other court. Moreover, the petition does not present an unsettled issue of law regarding the proper forum for deciding the laches issue, because that issue was properly decided by the lower court. Finally, given the unique circumstances surrounding this case, the petition does not present an important issue of federal law.

I. The decision below comports with this Court's decision in *DelCostello v. Brotherhood of Teamsters* and does not conflict with the decisions of the other courts of appeals, and so does not need to be reviewed.

1. The petition argues that the Eighth Circuit's opinion improperly ignores the analysis of this Court in *DelCostello*. *DelCostello* dealt with which statute of limitation should be "borrowed" in certain "hybrid" cases under the Labor Management Relations Act involving federal lawsuits against both an employer (for breach of a collective bargaining agreement) and a union (for breach of the duty of fair representation). *DelCostello*, 462 U.S. at 154. The Court determined that the limitation period contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should be "borrowed" as the statute of limitations for both claims in such "hybrid" cases. *Id.* at 155.

The *DelCostello* Court based its determination on a number of factors, including the fact that the six month

period represented a congressional determination that such a period represented a balancing "between the national interest in stable bargaining relationships and finality of private settlements," the need for a longer period for filing a federal lawsuit than is given in most state limitation periods, and the need for national uniformity. *Id.* at 166, 171.[2]

In this case, the Eighth Circuit determined that, while it could not decide the claims for money damages filed by the individual respondents, it could declare what other relief was available to them because there was a controversy regarding the necessity of and availability of arbitration. *Cf. Butler v. Local Union 823*, 514 F.2d 442, 454 (8th Cir. 1975) (a final judgment should grant the relief to which a party is entitled, even if that relief was not requested in the pleadings).[3] In so doing, the court did not determine that laches governed the bringing of this *lawsuit* as argued by petitioner (Pet. 10-12), but instead determined that laches could limit the availability of *arbitration*.

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[2] The Court, however, was not asked to determine that federal law required that there be a six month statute of limitations which was to be implied as the time limit for requesting arbitration when the parties themselves (or through the requirements of an Act of Congress) established the procedures for arbitration, but failed to establish the time period for initially requesting arbitration.

[3] As noted above, part of the thrust of the various complaints was a request for money damage. However, the complaints also raised issues regarding the interpretation of the March 4th Agreement and the RITEA which petitioner and the individual respondents debated during the course of this litigation. Such issues are to be decided by federal courts. *See*

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Indeed, part of the controversy which existed among the parties centered around the need for the individual respondents to have obtained arbitration in a proper forum before filing the present lawsuit. In addition, the parties argued about the affect of the sunsetting provision on the arbitration provisions that were added to the RITEA.[4] Since an arbitrators decision on the merits had not yet been obtained by many of the individual respondents,[5] this issue was properly presented to the courts below for resolution. Moreover, since a true controversy existed between the parties which needed to be resolved, the court below did not determine the arbitration issue *"sua sponte"* as argued by petitioner (Pet. 7).

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Chicago & North Western Transportation Co. v. United Transportation Union, 111 L.R.R.M. 2642, 2643 (D.D.C. 1982) (interpretation of March 4th Agreement is within the "province of the federal courts"). *See generally Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972) (contract governed by federal labor statute are "governed and enforceable by federal law, in the federal courts").

[4] To help it decide the dispute regarding the applicability of 45 U.S.C. § 797c(g) in light of the sunset provision in § 797c(f), the Eighth Circuit requested the parties to submit a post-argument memorandum dealing with that issue.

[5] The seniority of a group of the individual respondents was explicitly affected by the terms of the arbitration award set aside by the Eighth Circuit's opinion. The petition does not appear to challenge the court's decision in setting aside that arbitration award. The issue of whether the arbitration award was correctly set aside is now the subject of a cross-petition filed by the UTU. *See United Transportation Union v. L. Lee Beardsly*, No. 88-___.

The Eighth Circuit's opinion was essentially an opinion declaring the right of each individual respondent to have his or her claim heard by a neutral arbitrator. The court used its authority to interpret the RITEA and the March 4th Agreement to clarify and declare the rights of the parties. Because the lower court issued what amounted to a declaratory judgment, the bulk of petitioner's argument regarding *DelCostello* is misdirected.

DelCostello dealt with the time limitations which apply to the bringing of certain lawsuits based on federal labor statutes. It did not deal with the timing of a request for arbitration nor did it place limits on a court's power to declare the rights of parties to seek a remedy when that remedy is still open to them. Neither of those issues can be classified as an issue connected with determining what statute of limitations applies to the bringing of a federal lawsuit. Therefore, the reasoning of *DelCostello* does not conflict with the action taken by the Eighth Circuit.

2. Because the individual respondents had not sought and obtained arbitration in a proper forum before filing suit, these cases differ from the cases of the other courts of appeals cited in the petition which dealt with when an action accrued for statute of limitations purposes (Pet. 10). In those cases, a request for arbitration had either been made and refused or had not been made before the contractual period for requesting arbitration had run.[6] Thus, those cases do not conflict with

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[6] *See, e.g., Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 38 (2d Cir. 1987) (action accrued when union rejected arbitration demand); *McCreedy v. Local Union No. 971*,

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the decision of the Eighth Circuit in this case, since no such refusal or time limit are involved.

The Eighth Circuit's opinion makes clear that the decision relating to the rights of the individual respondents to have their claims arbitrated was based on the fact that arbitration was still available under the terms of the RITEA and the March 4th Agreement. The court's opinion establishes a consistent scheme requiring that the respondents first seek arbitration of any dispute in a forum with proper jurisdiction before seeking review of the merits in federal court. Thus, the court examined the merits of the one claim which had gone to and been decided by arbitration, while referring all other claims to arbitration.

3. To the extent that the opinion below indicated that arbitration was available even though more than six months had passed from the signing of the agreements at issue, the decision is neither surprising nor incorrect. The court held that because the provisions of the March 4th Agreement and the RITEA did not contain a time limit for bringing arbitration, that the respondents were not automatically barred from seeking arbitration (Pet. App. 40a-43a). Thus, the court determined that even though

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UAW, 809 F.2d 1232, 1237 (6th Cir. 1987) (action accrued after union took no appeal to arbitration within the 7-day period specified in contract); *International Association of Machinists v. Allied Products Corp.*, 786 F.2d 1561, 1562, 1565 (11th Cir. 1986) (action accrued when employer refused to arbitrate); *Teamsters Union Local 315 v. Great Western Chemical Co.*, 781 F.2d 764, 769 (9th Cir. 1986) (action accrues when employer communicated its refusal to arbitrate to union); and *Federation of Westinghouse Salaried Unions v. Westinghouse Electric Corp.*, 736 F.2d 896, 902 (3d Cir. 1984) (action accrues when employer finally refuses to arbitrate).

the individual respondents could not bring unfair representation claims in federal court, they could still seek arbitration, subject to a defense of laches.

Petitioner incorrectly argues that the Eighth Circuit's approach does not square with this Court's reasoning in *DelCostello*. However, *DelCostello*, and cases decided subsequent to that opinion, have dealt with whether a federal six month statute of limitations impliedly applies to breaches of the duties established by certain federal labor statutes. No case has ever held or implied that a six month limitation period exists for demanding arbitration under a contractual arbitration procedure or under a statutory provision creating an arbitration procedure. Indeed, if such a period were implied into a contract, the Court, rather than the parties, would be establishing contractual time limits for arbitration procedures.

Generally, a collective bargaining agreement governs the use of arbitration, and such an agreement sets the length of time which a party or an employee has to initiate a request for arbitration. The six month *DelCostello* period applied to labor cases has no relation to the time period specified for arbitration. Many contractual arbitration time limits are short, and may be as short as 48 hours. Other time limits for arbitration are much longer. *Cf. Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1190 (3d Cir. 1984) (contractual provisions in labor agreement may *prevent* bringing of dispute for one year); *Conticommodity Services Inc. v. Phillip & Lion*, 613 F.2d 1222, 1226 (2d Cir. 1980) (describing a one-year period for seeking arbitration in the non-labor context). Therefore, the six month statute of limitations is not related to the

ability of an employee to file an arbitration claim under a collective bargaining agreement.

This concept can best be illustrated by a hypothetical example from an arbitration context slightly different from the one at issue. Assume that parties have agreed that because of past discrimination, any discrimination claim brought by an employee can go to arbitration up to one year following the alleged discriminatory act. Federal law and most state laws only allow a person six months for the filing of a discrimination claim with the appropriate agency. *See, e.g.*, 42 U.S.C. § 2000e-5(f). Failure to file within that time period bars a subsequent lawsuit. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Under that scenario, if an employee attempts to file a discrimination complaint with the appropriate agency seven months after the alleged act, the agency should dismiss his claim immediately. If the employee then files a lawsuit, the court will state that the employee's action is barred by the applicable limitation period. However, if the matter reached the court quickly enough, the court could correctly indicate that while having no jurisdiction to hear the substantive discrimination case, it could still declare that arbitration under the contract was still available to the plaintiff because the arbitration period specified in the agreement had not yet expired.

The above example demonstrates that a person can be denied access to a court regarding a claim, while still having the ability to raise that claim in an arbitral forum. *Cf. Santos v. District Council of New York*, 619 F.2d 963, 969 (2d Cir. 1980) (accrual of cause of action for statute of

limitation purposes may not preclude the availability of other relief in a non-judicial forum).

In this case, the court below made a similar decision to the hypothetical decision described above. The court held that it did not have the ability to hear the claims for money damages. The court, however, also stated that because neither the March 4th Agreement nor the RITEA specified a time limit for bringing an arbitration claim, the individual respondents could bring a claim for arbitration subject to the defense of laches. Therefore, the lower court's decision is correct.

II. The Eighth Circuit properly declared that an arbitrator rather than the court should decide the laches issue in each case.

The petition presents a question involving whether a court or an arbitrator should decide in the first instance that an arbitration proceeding should be barred because of laches (Pet. i). The precedents of this Court indicate that such a decision is for the arbitrator to decide. Thus, the Eighth Circuit's decision was correct and need not be reviewed by this Court.

1. In the petition, petitioner argues that if the laches issue needs to be decided, this Court should clarify who should decide that issue (Pet. 14-15). This Court, however, has examined the questions of whether laches is to be decided by an arbitrator or a court, and has determined that the arbitrator is the proper person to decide the issue. For example, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-58 (1964), this Court held that if an arbitrator was to hear the "substance" of a

disagreement, then he or she should also hear and decide the "procedural" issues arising out of the dispute. Indeed, the court stated:

> It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compels such a result.

Id. at 557.

As is discussed more fully below, the substance of the underlying dispute in this instance and the procedural question of laches are intertwined and will require resolution of closely related factual issues. *John Wiley* indicates that such disputes are properly sent to an arbitrator for resolution.

In *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972), this Court also found that when an agreement empowered an arbitrator to decide "any difference" which existed under an agreement, the arbitrator rather than the court would decide a dispute relating to the issue of laches. The *Flair Builders* decision emphasized that procedural issues such as laches should be decided in the first instance by an arbitrator. *See also Conticommodity*, 613 F.2d at 1226 (arbitrator in non-labor context to decide whether arbitration is time-barred); *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986) (even "frivolous" claims for arbitration may be sent to an arbitrator for resolution).

Petitioners, however, question whether the Court of Appeals had the authority to describe some of the factors which an arbitrator should examine when looking at the laches issue in this case (Pet. App. 42a). The court stated that the arbitrator should look at two issues. "First, the arbitrator should consider the delay in seeking redress caused by the closing of the Rock Island locals by various internationals" (Pet. App. 42a). "Second, the arbitrator should take into account the cumulative effect of the serious unfair representation by the internationals in terms of the March 4th appellants" (Pet. App. 42a). Petitioner argues that these two directives were issued in violation of the arbitrators right to determine the laches issue.

However, the court below did not say that those were the only two issues that an arbitrator must examine. Moreover, in light of the court's holding regarding the improper actions by the UTU and others, the court could correctly declare that an arbitrator had to review that holding in reaching a laches decision. General principles of collateral estoppel require that when an issue has been decided as between two or more parties, that issue should not be re-litigated. Here, the court, after full argument and briefing, reached certain conclusions regarding the actions of the various parties. Those conclusions should be binding on an arbitrator, so the court correctly declared that an arbitrator must take them into account.

2. The substantive and procedural issues which will be connected with any arbitration are factually intertwined. Part of the individual respondents' claims are based on actions by the unions in both the negotiations and in their dealings with the individual respondents.

Those same actions are also connected with the issues raised regarding whether there was inequitable conduct by the parties which would cause the equitable tolling of a statute of limitations if the case were in court or would prevent a finding that laches applied if the case is heard in an equitable forum.

This Court has stated that "[w]hether laches bars an action in a given case *depends upon the circumstances of that case* and 'is a question primarily addressed to the discretion of the trial court'". *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 435 (1965) (emphasis added; citation omitted). Thus, to determine whether laches applies, a number of factual issues must be decided and weighed by a fact-finder. Such factual issues may vary from individual to individual in this case. The Eighth Circuit properly sent the laches issue to an arbitrator to decide, since such a fact intensive decision should be left to the fact-finder who will resolve the substantive issues. *Cf. John Wiley*, 376 U.S. at 557.

3. Petitioner also raises issues regarding whether it is equitable for disputes which have been around for a number of years to be sent back to arbitration (Pet. 12). It argues that the various parties have "structured their operations and lives" according to the belief their earlier arrangements are final. That argument, however, shows why the arbitrator, rather than a court, should hear the laches issue, since the determination of the laches issue necessarily requires a weighing of the equities that affect all parties which exist in each case. *Cf. Burnett*, 380 U.S. at 435.

As this Court has stated:

> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claims to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties." . . . And so, a suit in equity may lie though a comparable cause of action at law would be barred.

Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (citations omitted). Thus, in determining whether the claims of the individual respondents are barred by laches, an arbitrator must necessarily weigh some of the equitable issues raised by petitioner.

Indeed, when similar questions regarding whether an arbitrator could properly determine how former employees of one company would fit into a new company, this Court stated:

> Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disrupting labor relations in the Wiley plant.

John Wiley, 376 U.S. at 552 n.5. Thus, this Court has indicated that arbitrators can and should handle the difficult questions raised by a situation such as this one. The lower court, therefore, was correct in sending the laches

issue, and all the equitable questions which the decision of that issue entails, to an arbitrator to decide. Thus, this Court need not review that decision.

III. The unique nature of this case means that the petition raises no issues of national importance which this court should resolve.

1. This case arose out of the discontinuation of service of the Rock Island railroad. The respondents know of no other cases pending or decided in any other court of appeals dealing with the availability of arbitration for former Rock Island employees as presented in this case. Petitioner, however, argues that the decision below conflicts with other decisions on several points. But, as noted above, those arguments are based on a misreading of the lower court's opinion and existing case law. The lower court did not, as petitioner argues, order *sua sponte* that certain relief be granted after finding that it did not have jurisdiction over the entire case. Instead, the Eighth Circuit determined that there was no subject matter jurisdiction over certain portions of the case, and no meritorious issues on another part of the case due to the statute of limitations, while impliedly holding that there was jurisdiction over another existing and remaining portion of the case involving a controversy between the parties. When the case below is interpreted in that fashion, no conflict exists between that decision and any other decisions.

2. The circumstances giving rise to this case are unique. The case involved the closure of a railroad, the reaching of a broadly worded agreement (i.e., March 4th

Agreement) regarding, among other things, the absorbtion of Rock Island employees into any of a number of potential new carriers, the passage of a federal statute (i.e., RITEA) specifically designed to meet the problems of the Rock Island situation, and the failure by at least one union to properly act during the negotiations regarding seniority. The combination of events which preceded the filing of the lawsuits at issue indicate that the resolution of particular matters as raised by this writ will not have any important federal consequences.

Indeed, because of the filing of this lawsuit and the opinion issued by the Eighth Circuit, it is doubtful that any other rail carriers, unions, or employees would conduct themselves in the same manner as those parties acted in this case. Moreover, in light of the case below, Congress itself may draft legislation dealing with the closure of a rail carrier more specifically and clearly so that the needs and expectations of all future parties are clarified further than they were in this instance.

Because the situation giving rise to these cases is unique, and because it is doubtful that they will be repeated, the petition raises no important issue of federal law which the Court should decide.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Petitioner,

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L. LEE BEARDSLY, *et al.*,
Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The petition for certiorari presents the question whether the six-month limitations period under *DelCostello* v. *Teamsters*, 462 U.S. 151 (1983), for "hybrid" actions by employees against employers and unions should be "borrowed" in actions to compel labor arbitration. The actions here were brought against petitioner Chicago & North Western Company ("C&NW") and the defendant unions more than six months—and in many cases, several years—after the events that gave rise to the claims of the individual plaintiffs, respondents herein. The court of appeals agreed with C&NW and the unions that the individual plaintiffs' claims could not be heard in

federal court because, among other things, they were time-barred under the *DelCostello* limitations rule, but rejected the argument that an order compelling arbitration of those claims was likewise time-barred. The court then directed the district court to enter an order submitting thee claims to arbitration, subject only to the defense of laches.

In their brief in opposition, the individual plaintiffs contend that the question presented is not squarely presented. That is simply incorrect.

First, the brief in opposition (at 8) contends that the court below "did not determine that laches governed the bringing of this *lawsuit* * * * but instead determined that laches could limit the availability of *arbitration.*" (Original emphasis.) But the plaintiffs concede that C&NW and the unions claimed from the beginning of the litigation that the plaintiffs' action was barred by the six-month limitation under *DelCostello.* While the court below accepted that defense with respect to the unfair representation claims, it rejected it with respect to the availabiliy of arbitration, and directed the district court to enter an order sending the claims to arbitration. Thus, the petition for certiorari squarely presents the question whether a suit to compel labor arbitration is governed by the *DelCostello* limitations period or by laches.[1]

Second, the brief in opposition contends (at 10) that "because the lower court issued what amounted to a declaratory judgment," the petition for certiorari regarding the application of *DelCostello* to suits to compel arbitration "is misdirected." But the suggestion that the

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[1] Despite the plaintiffs' contention (Br. Opp. at 19-20) that this case presents unique factual circumstances that should militate against a grant of certiorari, the facts here cleanly present a legal question that can arise wherever an order for labor arbitration is sought, and that has in fact arisen in a number of court of appeals cases. See Petition for Certiorari at 9-10.

issue—whether the six-month limitation applies to suits to compel arbitration—can be side-stepped by characterizing the order in this case as "what amounts to a declaratory judgment" is simply frivolous. If an order to submit the claims to arbitration (which is what the court of appeals directed the district court to enter) would be barred by the six-month statute, a "declaratory judgment" that the claims must be submitted to arbitration is likewise time-barred.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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